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ABSTRACT

This book is a compilation of articles by Linda Zook, Steven Bower, Thomas Black, Frank Aquila, Patrick Tydings, Robert Powers, and Bruce Graham on the legal and educational history of school segregation. An initial article reviews the Federal court process. Also presented is a general historical review of Supreme Court doctrine on the issue of racial integration and black civil rights from 1949 to 1979: court decisions are explained in the context of the prevailing social philosophy regarding black intelligence. The background and issues involved in five cases in which the "separate but equal" doctrine operated are discussed. Other chapters focus on the background and testimony regarding the Brown decision, as well as other school desegregation cases after "Brown." A description of four cases involving busing as a desegregation method is also presented. The final chapter in the book addresses desegregation litigation in Northern cities. Extensive bibliographies are provided both for individual cases discussed throughout the book and on legal, historical, and general issues relating to school desegregation and racial discrimination. (GC)

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RACE EQUITY IN EDUCATION:
THE HISTORY OF SCHOOL DESEGREGATION 1849-1979

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INTRODUCTION

The primary reason this book was developed was because of the numerous requests received for both in-service and pre-service presentations on the legal and educational history of school desegregation. We at Indiana University who have worked with school districts in the development of desegregation plans needed a manual which could assist in the development of an understanding of the complex issues underlying the organization and implementation of an effective desegregation plan.

We could find no single source document which included both an in-depth analysis and a review of school desegregation litigation. There were many short summaries of individual cases; there were also expansive reviews of a single desegregation case. What was missing was an analysis and explanation of key school desegregation court cases. Such an analysis needed to include a historical review, an explanation of each case's specific impact on the emerging state-of-the-art, as well as its influence on the present school desegregation state-of-the-art. It, therefore, seemed appropriate to develop such instructional material.

Simply presenting and distributing the court decisions was impractical, ineffective and expensive. The "language of lawyers" is even more tedious than that of educators. Without special legal training or extensive time for review it is almost impossible for the lay person to understand the nuances of a judicial decision, especially due to the confusing legalese. We therefore decided to decode the legalese and to simplify the conceptual base.

Thus, the terminology is that which the average reader can understand with only a limited review. Obviously, the specialized language of school desegregation could not be eliminated, nor should it have been. We did not substitute different words for "discriminatory impact", "segregative effect", or other standard terms such as "de facto" and "de jure" segregation. Rather, our purpose was to avoid the words only lawyers use and understand. Specialized legal terminology was, therefore, carefully scrutinized.

It is our hope that individuals will utilize this publication early in their development of an understanding of the specialized issues involved in school desegregation. This need not be the initial document which an energetic learner reads, but it should be one which is reviewed in the early stages of investigation. It should then be read again, some time in the future, after a better understanding of the issues of school desegregation has been reached.

The selection of individual cases was arbitrary. It is hoped that our review and selection process did, in fact, provide the specific cases necessary for a comprehensive understanding of the issues. There have been thousands of school desegregation cases; therefore, it was necessary to pick and choose.

Obviously, watershed cases were chosen. Only time will tell whether our selection of the more recent cases was appropriate. It was felt the selection of the most recent cases—Dayton II, Columbus, and Indianapolis—presents a harbinger of future Supreme Court movement toward metropolitan remedies.

The desegregation and eventually the integration of the American educational system is the single most imperative need in our society today. It is probably not inappropriate to say that segregation is our singular most destructive social ill. An institution or a society which supports and continues the legacy of discrimination and deceit decays our national pride and purpose. With the Columbus and Dayton decisions, possibly ending the artificial distinction between de facto and de jure segregation, it appears that the court is again swinging back to a more reasonable and reasoned approach to school desegregation.

Dayton II and Columbus appear to be important cases for future desegregation activity. The presumptions of *Keyes* and *Swann*, as interpreted in *Dayton II* and *Columbus*, "sweep away the distinction between de facto and de jure segregation" (Justice Rehnquist's dissent, *Dayton II*). Moreover, the court's use of affirmative duty "renders any discussion of segregative intent after 1954 gratuitous . . ." Given a de facto segregated school system in 1954, the school board overseeing that system has an affirmative duty to desegregate, including refraining from actions or policies that impede desegregation or perpetuate segregation.

If a de facto segregated school system is, in fact, proven to have existed in 1954 or if a de facto system has come into existence after 1954, the board has a duty to desegregate. Doing little or nothing to dismantle this dual system does not fulfill the board's duty and violates the Fourteenth Amendment's equal protection clause. Moreover, this violation finding is without respect to purpose or discriminatory intent since the court stated in *Dayton II* that it is the "effectiveness" in liquidating the dual system and not the "purpose" behind the board's actions, regardless of discriminatory intent. However, the board can rebut this by showing that their actions or inactions served "important and legitimate ends" (but this is a far more difficult task and shifts the burden of proof).

It appears that the pendulum swing of the middle-seventies which blunted the on-going thrust for social equality has been reversed. While only time can tell if this eventuality results, forward-looking approaches since the *Brown I* and *II* decisions may, indeed, have been re-established. The Supreme Court may be instituting an attack on the ills and the injustices which have plagued our society for over three hundred years.

The majority of the credit for this publication goes to the many individuals who coordinated the research, initiated the legal investigations, and masterminded the product to its completion. These individuals are cited in the text. The review of the manuscript by Linda Zook and Janie Stoehr was most important. The assistance of Karen Marek in typing and proofreading the material is greatly appreciated. The publication could never have been completed without their dedication and expertise.

FEDERAL COURT PROCESS

Linda Zook

This general overview of the federal court process is included to enhance the reader's understanding of school desegregation law.

School desegregation law has, with few exceptions, been created in the federal courts. School desegregation is a constitutional issue. Article II, Section 2 of the U.S. Constitution grants the federal judiciary the power to decide "cases in law and equity arising under the Constitution." This grant of federal question jurisdiction is the basis upon which the federal courts may render binding decisions in school desegregation cases.

To initiate a suit in federal court, the party bringing the charge, the plaintiff, files a complaint in a federal district court. The district courts are the lower courts and the trial courts of the federal judicial system: actual trial takes place at this level, where the pleadings are filed, the witnesses testify, the evidence is admitted, and where both sides present their arguments. A transcript of the proceedings is made, and this, with the pleadings and the judgment, make up the record which is used as the basis for appeal.

There are ninety-four district courts in the United States. The written decisions of the district courts are published in the Federal Supplement by West Publishing Company as a cumulative, multi-volume set. These cases are cited as (Volume) F. Supp. (page numbers). For example, *Goss v. Board of Education*, 186 F. Supp. 559 (1960), refers to a district court decision located in Volume 186 of the Federal Supplement at page 559.

After the district court announces its final decision, any party may appeal to a United States circuit court of appeals for review of the judgment. The United States circuit courts, as appellate courts, are limited in their review to matters included in the trial court record and to issues raised by the parties on appeal. An appellate court cannot consider new evidence, hear additional arguments of law, or make its own findings of fact.

A circuit court can reverse a district court decision only when the evidence does not support the judgment, when the district court judge abuses his or her discretion, or when the judge makes an error of law. If an error is found, grounds for reversal do not exist unless the error prejudiced the appellant's case. These standards for reversal of a district court judgment are heavily weighted in favor of upholding the judgment.

If the court of appeals determines that a judgment is in error, the judgment is reversed and remanded to the district court for further disposition in accordance with instructions of the appeals court, which may instruct the district court to retry the case, to make further findings of fact or to dismiss the case.

There are eleven U.S. circuit courts of appeals. The written decisions of the circuit courts are published in the

Federal Reporter, Second series, by West Publishing Company. They are cited as (Volume) F. 2d (page number). For example, *Goss v. Board of Education*, 301 F. 2d 164 (1962), refers to a court of appeals decision appearing in Volume 301 of the Federal Reporter, Second Series, at page 164.

There are three methods by which a decision of a court of appeals may be reviewed by the Supreme Court. The first is by petition for a writ of certiorari which may be filed by any party. The Court has the discretion either to grant or deny a writ of "cert." It is generally granted only in cases in which an important federal question is involved or in which there is a conflict of authority in a legal point in the various courts of appeals. The second method is by appeal, which is available only in cases in which the court of appeals has found a state statute unconstitutional. Review by appeal is a matter of right and the court must hear the appeal. The third method is by certification by the court of appeals of a question of law in a pending case by which the Supreme Court may answer, in its discretion, and give binding instructions to the court of appeals.

The U.S. Supreme Court also has the jurisdiction to review certain final judgments of the highest courts of the states. To obtain such review, the case must be one involving a substantial federal question and the decision of the question must be crucial to the case. A state court judgment is subject to review by appeal to the Supreme Court in a case in which a state statute has been challenged as unconstitutional and the state court upholds the state statute.

When the Supreme Court does review a case, it sits as an appellate court. It is subject to the same limitations on its scope of review as is the United States circuit court of appeals. The Supreme Court reviews about 200 to 250 cases each year, which is about three percent of all federal cases.

Supreme Court decisions are published in the Supreme Court Reporter, an official government publication. They are cited as (Volume) U.S. (page number). For example, *Goss v. Board of Education*, 373 U.S. 683 (1963), refers to a Supreme Court decision which can be found in Volume 373 of the Supreme Court Reporter at page 683.

The Supreme Court may dispose of a case in several ways. First, it may refuse to review the case, in which instance the court of appeals decision is final. Second, it may affirm the court of appeals decision. Third, it may reverse the court of appeals decision and reinstate the district court decision. And fourth, it may reverse both of the lower court decisions and remand to the district court for further action in accordance with its instructions. If the Supreme Court instructs the district courts to retry the case, either in whole or in part, the decision on retrial is appealable again through the original process. It is possible, therefore, to have the same case heard twice on all three levels, i.e. district, appeals and Supreme.

School desegregation law is judge-made law, as opposed to statutory law created by Congress. To understand fully the development of school desegregation law, one must understand the doctrine of precedent as applied in our common law judicial system. The doctrine of precedent dictates that the courts resolve legal disputes by reference to past cases or precedents. The lower courts are bound by the decisions of the higher appellate courts. The Supreme Court reserves to itself the right to depart from a rule which it has previously established. The Supreme Court will overrule its own precedent only when such action is necessary to avoid the perpetuation of error or when the need arises to keep the law in accord with the social mores of the time.

The use of precedent ensures certainty and predictability in the law. Precedent is followed only when the factual circumstances of the prior case are similar to the case at hand. It is within the discretion of the judge to determine whether the facts are sufficiently similar to warrant application of the rule of the prior case. The higher courts also have the discretion to overrule precedent when it is not in accord with the social policy of the time. These factual and social policy considerations add an element of flexibility to our common law system which allows the law to change with the times and with experience.

FOREWORD

The Supreme Court and Racial Integration: An Historical Review 1849-1979

Steven Bower

The legal debate surrounding the practicality of racial integration, defined here as the simple mixing of the races, presents an opportunity to review some of the more fundamental aspects of historical understanding. While the "equality" of the races has become an important element of the everyday taken-for-granted reality of the twentieth century American citizen, this present-day understanding has not always been the case; and, in fact, the term "equality" itself has had different meanings depending on the social and historical understanding extant at that specific time. As the Supreme Court decisions affecting desegregation are traced from the middle of the nineteenth century to the latter half of the twentieth, it becomes more obvious that as the perception of "race" changes the perception of "equality" changes also.

Prior to the passage of the Fourteenth Amendment, which enjoined the individual states from "abridging the privileges and immunities of the citizens of the United States," the Supreme Court was confined to defining "equality" in reference to the absolute order rather than the relative order of the law. Under the absolute order of the law "equality" could be judged only on the basis of whether the laws as written were applied in the manner in which the original lawmakers intended them to be applied.

An appropriate example of these earlier decisions is the *Roberts v. City of Boston* (1849) case that represents one of the earliest attempts to challenge the legality of school segregation. The case centered around the efforts of Sara Roberts' father to enroll his five year old black child in an all-white school closer to her home. The law forced Sara Roberts to attend Boston's Negro Smith Grammar School which was some distance from her home. The court rejected the plea of the plaintiff which, in effect, argued that all people regardless of sex, birth, color, origin or condition are equal before the law. The court rejected this plea stating that equality before the law does not mean that each person has "the same civil and political powers and that children and adults are legally to have the same function and be subject to the same treatments; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternalistic consideration and protection of the law for their maintenance and security." The court's judgement in this case reveals that "equality" simply meant the right to be treated in the way the laws had been prescribed.

It was not until after the Civil War and the passage of the Fourteenth Amendment that the Supreme Court began to define "equality" in reference to the relative order of the

law. This was to permit the court some discretion in reviewing how the individual states had legally prescribed the concept of "equality" as indicated in the Constitution. The Amendment declared that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

The new amendment, under the proper circumstances, permitted the Supreme Court, as judicial arm of the federal government, to review any cases that held the "privileges and immunities of citizens of the United States" in question. This, as Robert McCloskey has pointed out, raised a number of critical questions about the nature of "equal protection":

Was it intended to reverse *Barron v. Baltimore* and make the Bill of Rights applicable to the states, that is, were the "privileges or immunities" it speaks of those that have heretofore been protected against national action alone by the Bill of Rights (free speech, jury trial, etc.)? Was the due process clause merely meant to outlaw unfair legal procedures in the states or to forbid all governmental action infringing on property which a court might regard as unjust? Was the "equal protection" clause to be taken literally? Did it mean that the states' laws could enforce no discriminations at all between person? If the sentence meant all of these things, or even a substantial part of them, then the federal system had been drastically revised, for the whole domain of civil rights now fell under the protection of the National judiciary.¹

If the court was to break new ground it would do so amid a sea of controversy due to the number of alternative routes that judicial interpretation could travel in order to arrive at a decision.

The court's first challenge in the face of the Fourteenth Amendment appeared in the 1873 *Slaughter-House* cases. Although these cases did not deal directly with the race question, they were to have a considerable influence over subsequent legal decisions dealing with the civil rights of minorities and, in particular, the issue of desegregation. Here the court affirmed the right of officials of the state of Louisiana to enforce a legislated law which gave monopolistic privileges to a corporation to establish stock landings,

cattle yards, and slaughter-houses at the expense of independent butchers who were being forced out of business. The independent butchers filed suit to have the statute declared invalid but the Supreme Court of Louisiana upheld the statute. Eventually the case appeared before the Supreme Court for review. The Supreme Court sustained the judgement of the lower court stating that the "privileges and immunities" clause of the recently constituted Fourteenth Amendment was designed to protect Negroes in their newly won freedom and did not give the court the power to sit in judgement on the "entire domain of civil rights heretofore belonging exclusively to the States." The following paragraph from the majority decision written by Justice Samuel Miller points to key areas effecting the court's response:

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. . .

The court, it appears, was stepping lightly into this new area of power by refusing to make any instantaneous and precedent-setting judgements that might have left it vulnerable to an assorted barrage of public criticism. By making the distinction between citizens of the State and citizens of the United States, the court had refused to invoke the "privileges and immunities" clause to override a Louisiana state law, reasoning that the case in question was not in violation of the "privileges and immunities" of a citizen of the United States. In the dissenting opinions of Justices Field and Bradley, it is evident that at least a portion of the court membership was beginning to manifest a fear of excessive intervention into the affairs of the "rugged individual" and the economic system of free enterprise. The minority opinion from *Slaughter-House* seems to forecast the future concerns of the court through its willingness to employ the equal protection clause of the Fourteenth Amendment to prohibit the state from legislating against "free trade." By 1880, what had been the minority opinion in 1873 had evolved into the majority opinion in such landmark decisions as the *Philadelphia and Reading Rail Road* case in 1873, "which outlawed freight tonnage taxes on interstate shipments," and the *Pensecola Telegraph* case in 1877, that "precluded the states from granting telegraph monopolies."²

As it became more and more acceptable for the federal judiciary to impose the Fourteenth Amendment on states that inhibited the development of private enterprise, the economic opportunities of black people began to shrink proportionately. Within the emerging logic of late nineteenth century judicial review, the Fourteenth Amendment could be employed to protect the civil and political rights of the freed man (the right to vote, free access to the voting poles, etc.), but it could not protect the Negro's social and economic rights from the "rugged individual," nor did it find it necessary to do so for that matter. This would have

required the court to enter into the private sector of democratic citizenship—the very area the court thought it was trying to protect in the first place. This, of course, granted the private sector a great degree of latitude to effect the fate of minority citizens.

One has to remember that this is the same age that wedded the "rugged individual" with the evolutionary principles of Social Darwinism. The immense influence of Charles Darwin and the evolutionary world view was to have a tremendous impact on the social thought of nineteenth and twentieth century Americans, particularly as it related to black people. Darwin's theory of evolution and the already popular notion of enlightened progress blended together nicely in the theories of William Graham Sumner and Herbert Spencer to produce the notion of Anglo-Saxon racial superiority. If Anglo-Saxons were a superior race then it logically followed that the mixing of the races, the superior with the inferior, represented the threat of racial degeneration and therefore, the progressive evolution of the social order. Darwin made reference to the problem when he remarked:

Thus the weak members of civilized societies propagate their kind. No one who has attended the breeding of domestic animals will doubt that this must be highly injurious to the race of man.³

If there was any doubt about black inferiority prior to the advent of Social Darwinism, it was quickly dispelled as Sumner's preachings became more thoroughly entrenched in the American mind.

Thinking of this kind was to hold, of course, a special meaning for "equality of opportunity." Equality simply meant that the individual should be given opportunities commensurate with how far one had advanced up the evolutionary scale, and it was apparent to most white people that blacks compared unfavorably with other racial strains, especially Anglo-Saxons. The practical implications of this belief were readily apparent in the philanthropic efforts of Northern corporate interests to finance a separate system of public schools for blacks in the post-reconstruction South. The separate system of schooling, largely technical and vocational in character, was believed to fit the inherent capabilities of black people. Education for the black person that sought to develop intellectual skills was considered a waste of time since blacks did not possess requisite intellectual skills, only manual skills.⁴

Major Supreme Court decisions that challenged racial segregation in the late nineteenth and early twentieth century reflected the assumptions of Social Darwinism and the inherent inferiority of black people. The influence of evolutionary thought is most noticeable in the contrasting opinions given by the court in *Railroad Company v. Brown* (1873) and *Plessy v. Ferguson* (1896).

In the few short years following the Civil War and the emancipation of the former slave, the general willingness on the part of the white community to admit blacks into main stream social life was heightened by liberal sentiments, largely Northern in origination, to make full amends for black suffering. The decision handed down in *Railroad Company v. Brown* (1873) is a good case in point. At the conclusion of the war, Congress enacted special legislation for the District of Columbia which had the effect of abolish-

ing the "separate but equal" distinction based on race. The legislation was eventually challenged when Catherine Brown, a passenger on a train in the District of Columbia, was forcibly ejected from a "white car" by railroad officials. The case came before the Supreme Court where the plaintiff was granted relief on the grounds that "separate but equal" had been determined discriminatory. If the railroad company was to continue operation in the District of Columbia, discrimination in passenger placement would have to cease. Twenty-three years after the *Railroad Company v. Brown* decision, the influence of Darwin would cause the court to take a complete turnabout.

In *Plessy v. Ferguson* (1896) the court established the permanence of the "separate but equal" doctrine that permitted the state the option of imposing laws that segregated blacks from whites as long as equal accommodations were provided members of both races. The case brought into question the legality of an Act of the General Assembly of the State of Louisiana, passed in 1890, that provided separate railroad carriages for the "white and colored races." The court virtually abdicated its earlier decision in *Railroad Company* by ruling that "laws permitting, and requiring separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other." The court also cited the Fourteenth Amendment stating that its objective was "undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." The court continued by saying that "if the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." The court then proceeded to record for all posterity the influence of Social Darwinism by specifically referring to the supposed genetic differences between the races:

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

The decision is particularly important since the separation of the races that at one time seemed to be based solely on subjective criteria, now had a legal sanction justified by the popular "scientific" opinions of the time. The apparent distinction between social and political equality was to become a long standing rule of thumb for the court in its judgements effecting black Americans.

The theory of biological evolution continued its domination of American society well into the twentieth century. While the "scientific racism" of the Social Darwinists cannot be blamed for the perpetuation of racial hatred and legislated oppression in the southern states, it did very little to ameliorate the problem either. Theories of racial inferiority were convenient justification for the lynching of blacks as well as for establishing institutional practices that were supposedly geared to the black man's inferior intellectual capacity. The former is vicious while the latter is a more benign manifestation of racism. Edward L. Thorndike, one

of the foremost proponents of the I.Q. test in the early twentieth century, posed the problem in the following manner:

If it be true, for example, that the Negro is by nature unintellectual and joyous, this does not imply that he may not be made more intelligent by wiser training or misanthropic and ugly-tempered by the treatment he now receives. It does mean that we should be stupid to expect the same results from him that we should from an especially intellectual race like the Jews, and that he will stand with equanimity a degree of disdain which a Celt would requite with dynamite and arson.⁵

The solution for Thorndike was not to disenfranchise blacks, but to integrate them into the large community by assigning them tasks which their "evolutionary potential" enabled them to do. If intelligence was a measurable quantity then it only stood to reason that people ought to perform those tasks that corresponded to their ability. For black people this usually translated into manual or technically-oriented schooling that obviously prepared them for the lower rungs of the economic order. The differentiated curriculum, which became an accepted part of institutional schooling in America, emerged from the studies of prominent psychologists like Thorndike who began to insist that education be geared to "meet the needs of the individual child." The concept of "need" was based, of course, on the innate intellectual capacity of the child.

The idea of equal opportunity, in this context, became a simple deductive endeavor. Assuming that intelligence could be measured, that what was measured was indeed inherited and fixed, and that people should be socially rewarded according to this measurement, psychologists could claim that everyone had an equal chance to perform and that the results were not in any way influenced by subjective whim but were the conclusive findings of the impartial social scientist dedicated to professional objectivity. The kind of schooling one received was rapidly becoming an accurate indication of the individual's eventual destination in the occupational structure of modern industrial America.

The hereditary argument, that I.Q. is a measure of inherited intelligence, was beginning to be challenged by leading social scientists in the 1930's and 40's. The challenge had always been present but it was not until later in the century that proponents of environmental causation were able to mount any substantial opposition to affect institutional procedure. The environmentalist argument, that relied heavily on environmental causation as explanation for I.Q. differential, challenged a number of hereditary beliefs. Was I.Q. a measure of genetic inheritance, or was it more a measure of environmental influence? If I.Q. was influenced by environment, was it a measure of intelligence at all? If I.Q. remained a measure of intelligence, was intelligence a fixed or relatively malleable entity? All of these questions cast a glare on previous explanations of the I.Q. differential between the majority white population and American minorities.

Foremost among those who pushed the environmentalist position was Gunnar Myrdal whose two-volume work on the American Negro, *The American Dilemma: The Negro Problem and Modern Democracy*, published in 1944, accented the new scientific findings of his time:

The wave of racialism for a time swayed not only public opinion but also some psychologists who were measuring psychic traits, especially intelligence, and perhaps, also some few representatives of related social sciences. But the social sciences had now developed strength and were well on the way toward freeing themselves entirely from the old biologicistic tendency. The social sciences received an impetus of their modern development by reacting against this biologicistic onslaught. They fought for the theory of environmental causation. Their primary object of suspicion became more and more the old static entity, 'human nature,' and the belief that fundamental differences between economic, social, or racial groups were due to 'nature.'⁶

While Myrdal might have discovered a plausible explanation for the black and white I.Q. differential, he failed to explain why that differential necessarily led to poverty and unemployment. What Myrdal seemed to disregard, Herbert Aptheker, author of *The Negro People in America*, chose to make a central thesis of his work. "The oppression and superexploitation of the American Negro," suggested Aptheker, "exist and are maintained because they were and are profitable and useful to America's propertied interests." The point to be made is that in spite of public disagreement over the plight of the Negro, it was Myrdal's environmental causation that ultimately provided the formula for black equality in America.⁷

The first Supreme Court decision that indicated the growing influence of environmental causation came in the *Sweet v. Painter* decision of 1950. In reviewing this case, the Court rejected the attempt by the State of Texas to maintain separate law schools for black and white students. Here the Court confronted the "separate but equal" doctrine for the first time but failed to indicate whether the *Plessy* decision remained applicable for public education. The majority decision included for the first time use of certain "intangible" evidence that was said to contribute to unequal protection of the laws. The following statement reflects this reasoning:

... the law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of news with which the laws concerned. The law school to which Texas is willing to admit petitioner (plaintiff) excludes from its student body members of the racial groups which number 85% of the population of the state and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioners will inevitably be dealing when he becomes a member of the Texas bar.

The "intangible" evidence entertained by the court was clearly those environmental factors that were said to lead to unequal education for the black law student. Of major significance is that the court in using environmental criteria to determine inequality had to define what constituted an inferior environment. According to the court, the all-black law school was inferior because it excluded 85% of the population of the state of Texas (presumably the white population) that the prospective black lawyer would even-

tually do business with. It is instructive at this point to see that the court chose not to rule on the legality of segregated facilities in and of themselves, but chose instead to focus on the supposed inferior education of an all-black school—illustrative of the growing influence of the environmentalist position.

The 1954 *Brown v. Board of Education of Topeka, Kansas* was the Supreme Court decision that finally rendered the "separate but equal" doctrine of *Plessy* unconstitutional and in violation of the equal protection clause of the Fourteenth Amendment. The court decreed that separate educational facilities were inherently unequal. Basing their decision, in part, on the work and testimony of leading social scientists, the court determined that separate, legally sanctioned educational facilities promoted an environment that irreparably damaged the personalities of minority black children and, consequently, led to a denial of equal opportunity. Citing the text of a lower court finding, the Supreme Court indicated its willingness to consider the full weight of certain "intangible" evidence leading to a denial of equal rights:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.

Although Kenneth Clark, in his study, *Effect of Prejudice and Discrimination on Personality Development*, asserted that officially sanctioned segregation by a state or local government caused personality damage to both minority and majority children, the court relied principally on arguments similar to Gunnar Myrdal's which emphasized the effects of segregation on black children. Analysis of subsequent court cases seems to bear this out.

In noting the pervasive impact of evolutionary thinking on twentieth century thought, it is essential to understand that the basic premise of the social order based on progressive evolution remained intact despite the challenge to the hereditarians. The opinions of social scientists that supported the *Brown* decision were not in substantial disagreement as to the social applications of evolutionary thought. Those individuals who are inherently and intellectually superior ought to find their appropriate rewards in a society based on the notion of equal opportunity. The primary contention of the environmentalists was that as a group blacks were not intellectually inferior to whites and that it was a misrepresentation of justice to maintain legal standards that upheld this fallacy.

In fact, it seems clear from all available evidence that the court would have had a great degree of difficulty in overturning *Plessy* unless it was assumed that blacks were intellectually equal to whites, an assumption the court could not make when it decided *Plessy* in 1896. Writing on "The Effects of Segregation and the Consequences of Desegrega-

tion: A Social Science Statement," Kenneth Clark, along with a battery of social science colleagues, argued "that the presently segregated groups actually are inferior intellectually, but these differences could be adequately explained in terms of environmental differences."⁸ If segregated public schools constituted an inferior environment and consequently unequal educational opportunity for black children, then it was simply a matter of challenging the idea of separate school systems. The decision of the court in *Brown* reflected this line of reasoning:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

As the court's position on school segregation gathered momentum after 1954, the assumption that provided the thrust was that separate facilities constituted an inferior environment for the education of black children. In the years after *Brown*, the segregation cases brought before the court would hinge upon the issue of that separation and the criteria used to identify it.

The formula that the court relied on through the early years of school desegregation cases to identify separation was strongly influenced by the racial balance of the school systems in question. In other words, systems that separately housed predominately black and predominately white school populations were noted to be in violation of *Brown I*.

This became more evident as the court began to consider segregation suits emerging from northern urban school systems. Although the court was restricted to ruling against those systems guilty of de jure segregation (segregation by law) only, the Supreme Court's broad definition of de jure was inclusive enough to be able to challenge northern school systems that, unlike the schools of the South, were never formally segregated by legal mandate. In *Alexander v. Holmes* (1969), for instance, de jure segregation was an evident characteristic of the schools in question. In this case, the question was one of a denial of fundamental rights of school children who were attending Mississippi schools under segregated conditions which were in direct violation of the decisions of the Supreme Court. The Supreme Court repealed an Appellate Court decision allowing the "dual" system more time to formulate a desegregation plan. The ruling ordered that the desegregation of the dual system must begin immediately and that only unitary schools be operated in the future.

The court's decree in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) was a clear indication of the legal criteria of separation. The Charlotte-Mecklenburg school system's attempt to implement a proposed desegregation plan was found to be unsatisfactory by the Fourth Circuit Court of Appeals. School board actions like locating schools in black residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods resulted in segregated education. In April 1969, the District Court ordered the school board to present a plan for both faculty and student desegregation. In December,

1969, the District Court ruled that the board's plan was unacceptable and appointed Dr. John Finger to prepare a desegregation plan. The Finger Plan was adopted after the Supreme Court, on June 29, 1970, ruled that the altering of attendance zones, pairing, clustering, grouping of schools, and busing were approved remedial tools for desegregation. Reliance on mathematical ratios, although not an exact racial balance, was a reasonable point to begin formulating a workable desegregation plan. Separation was defined as racial unbalance and the appropriate remedy was mixing black with white whether it meant students, faculty, or administration.

Whether the expert witnesses in *Brown* regarded the inferior environment created by separation as the simple absence of mixed school systems is not easily substantiated; but from the available evidence, including the Charlotte-Mecklenburg ruling, the Court began to define it in that manner. The implications of the Court's criteria for inferior environment was immediately detected by a number of individuals and organizations interested in the school desegregation issue. Christopher Jenck's writing in *Inequality: A Reassessment of the Effect of Family and School in America*, described the situation in this manner:

In a community where the school administration believes in desegregated schooling and encourages black parents to attend desegregated schools, such a system could produce dramatic changes in attendance patterns. The 'liberal' alternative, which is widely viewed as the road to racial equality, seems to be compulsory busing of blacks to white neighborhoods and vice versa. This implies that black parents cannot send their children to all-black schools, even if they want to, because all-black schools are by definition inferior. This position strikes us as both racist and politically unworkable over the long haul.⁹

Indeed the liberal ideal of equal opportunity based on a perfect mix and supported by the strength of the environmentalist argument has racist tendencies from the standpoint of both assumptions and objectives.

The black community also began to attack the "liberal" objectives of the Supreme Court. In a brief submitted by the Congress of Racial Equality (CORE) in *Richmond v. Virginia State Board of Education* (1972), the problem was confronted head on:

Theoretical testimony which suggests that no educational system will work if it is "majority black" is strongly racist and should be ignored by a federal court, especially when such testimony is sought to be used as a basis for disenfranchising Black residents, since Blacks would be permanently prevented from achieving control of a school system in which they are the majority and as a result, denied due process as guaranteed by the Constitution.

This did not mean that CORE had given up the quest for unitary school systems, for such was not the case. "Any subsequent effort at consolidation of unitary school systems," CORE suggested, "merely for the purpose of achieving a so-called viable racial mix, results in irreparable injury to Blacks." The brief concluded by ascertaining that the "two critical elements of the dual or segregated system de facto or de jure are: (1) racial exclusivity and (2) white power monopoly."

As if to add insult to injury, the shifting winds within the social scientific community were to further challenge the liberal/environmental vision of the integrated society. Arthur R. Jensen's study, "How Much Can We Boost I.Q. and Scholastic Achievement," published in the winter 1969 issue of the *Harvard Educational Review*, vigorously attacked the educational theories of the "environmentalists," claiming they placed undue emphasis on social and economic factors as causal explanations for I.Q. differential between black and white students. Jensen explained that Negro scores averaging about fifteen points below the white average on I.Q. tests must be taken seriously as evidence of genetic differences between the races. The bulk of federal money used to wage war on poverty during the Johnson administration in the form of "compensatory" education programs for the poor had failed, stated Jensen, and authorities were at a loss for explanation:

What has gone wrong? In other fields, when bridges do not stand, when air craft do not fly, when machines do not work, when treatments do not cure... one begins to question the basic assumptions, principles, theories, and hypotheses that guide one's efforts. Is it time to follow suit in education?

For Jensen, the explanation was found in the genetic differences between the races.

Although Jensen underscored his opposition to racial segregation, his findings directly challenged the bright-eyed optimism of those who pushed for the "viable racial mix" formula for equality based on the assumption of intellectual parity between the races. Jensen stated that:

All persons must be regarded on the basis of their individual qualities and merits, and all social, educational, and economic institutions must have built into them the mechanisms for insuring and maximizing the treatment of persons according to their individual behavior.

In other words, blacks as a group were probably less intellectually gifted than whites, but you couldn't assume that this was true in every individual case; and, more than likely, there were many black people whose personal qualities ran contrary to the norm. Jensen further argued that general genetic deficiencies probably played some role in the disproportionate representation of Negroes in lower socio-economic groups.

Actually, the latter assumption that low I.Q. determined low socio-economic standing is not altogether different from the assumption that environmentalists had been making about poverty, unemployment, and general lack of economic success. The difference between Jensen and the environmentalists is the claim that blacks fail more often due to the lack of high order genes. Environmentalists, on the other hand, had been arguing that high order genes had been distributed equally among black and white citizens and if environmental factors were neutralized this equal distribution would undoubtedly appear. Nevertheless, this subtle difference of opinion was to have a dramatic effect upon the fortunes of minority groups as governmental agencies began to implement programs based upon the "new" findings about black people.

While the Supreme Court decision in *Milliken v. Bradley* (1974) can be explained either by the charges that various groups and individuals were leveling at the environmentalist ideal of a "viable racial mix," or by the shifting social science opinion of black achievement, it is probable that the court was influenced by Jensen's heritability thesis. One thing was certain, *Milliken v. Bradley* was the beginning manifestation of the court's new attitude toward school desegregation and equal opportunity. In *Milliken* the Supreme Court seriously considered for the first time the legality of interdistrict remedies to eradicate the harmful effects of enforced segregation. The court ruled that metropolitan-wide or interdistrict remedies were inappropriate unless either or all districts concerned had been found guilty of de jure segregation or that segregation in one district was found to have a segregative effect on the other school district or districts. Racial imbalance was not sufficient evidence. The court did not find de jure segregation in the surrounding school districts even though the Detroit school system was found to have been intentionally segregated. On this basis, the interdistrict remedy ordered by the district court was held inappropriate. Clearly, the court, in making this judgement, had tightened the definition of de jure segregation by indicating that segregation based only on racist criteria was subject to remedy. The important criteria for the court was not obvious racial imbalance, but whether the imbalance came about through the intent of depriving a minority group equal protection under the laws of the United States.

In order to connect court opinion to the heritability thesis, one has to consider two Supreme Court decisions not directly related to school desegregation, but due to their effect on minority claims to equal opportunity, are fundamental to understanding the assumptions as a basis for ground school desegregation decisions. The first, *San Antonio Independent School District v. Rodriguez* (1973), involved members of a number of poor families who resided in school districts having a low property tax base. The property tax was used, of course, to finance public education. The plaintiffs claimed that the system of financing schools in Texas was unconstitutional since it favored the more affluent and discriminated against those neighborhoods where the value of assessable property was low. The Supreme Court, after reviewing the evidence presented in the lower court, found that the plaintiffs made no demonstration that the system operated to the peculiar disadvantage of any class. According to the court, the district court never bothered to deal with questions of whether "lack of personal resources" occasioned an "absolute deprivation" of the desired benefit.

What is interesting is the court's contention that proof was needed to show a relationship between "lack of personal resources" and "absolute deprivation." If one believes, as Jensen believes, that the "lack of personal resources" or low socio-economic standing is the result of low I.Q. then it is also likely that one believes that the differences in school resources are also a result of low I.Q. Rather than leading to "absolute deprivation," the differences in school resources are more an indication of the natural order of things. In other words, deprivation becomes very difficult to justify if it is believed that the poor

are poor of their own account and not because of any inequities in the system as the environmentalists had been arguing for thirty years. Where wealth was involved, the court continued, equal protection under the Constitution did not require absolute equality or precisely equal advantages. This last statement, more than any other, seems to implicate this court with the new birth hereditarians. Although those convinced of the importance of environmental influences never argued that wealth be distributed equally, they pushed relentlessly the argument that advantages to obtain wealth ought to be equalized. The Supreme Court of the seventies was beginning to part fundamentally with its judicial brethren of the previous two decades.

In *Washington v. Davis* (1976), a case dealing with employment discrimination, the Supreme Court moved further away from the environmentalist index of discrimination when it reversed a lower court decision on the constitutionality of a test used to admit prospective policemen into the training program of the District of Columbia police department. The plaintiffs, among them black police officers and rejected black applicants, alleged that the tests used to measure the abilities of job applicants violated their constitutional rights primarily on the grounds that a higher percentage of blacks failed the exam than did whites. The Supreme Court, in review of a Court of Appeals decision in favor of the plaintiffs, reversed the lower court decision, stating that the due process clause of the Fifth Amendment prohibits government "from invidiously discriminating against people or groups" and that an essential element of invidious discrimination is "a purpose or intent to discriminate and that the Supreme Court has not accepted the proposition that a law or action can be found to be discriminatory solely on the basis of its racially disproportionate impact." The majority decision continued by stating that "the Constitution does not prevent the government from seeking modestly to upgrade the communicative abilities of its employees. . . just as an action by all persons who failed (test) would not succeed on equal protection grounds, so too should an action by blacks who failed not succeed absent any showing of discriminatory intent."

This judgement struck a sour note in the environmentalist chorus of discrimination based on racial imbalance. The hereditarian argument had successfully reversed the earlier claims of the environmentalists by casting some doubt as to the equal intellectual capacity of the Negro. Arguments within the social scientific community were apparently returning full circle to its earlier twentieth century conviction of genetic determinism and the uses of this knowledge for structuring the social order. Just as the environmentalist persuasion of the fifties and sixties had seemingly provided the rationale for minority opportunity, the hereditarianism of Jensen and his followers provided the rationale for limiting it. Edmund Cahn, in reviewing the *Brown* decision in 1954, warned twenty-two years prior to *Washington v. Davis* of the hazards of using social science opinion to determine the social, political, and economic rights of American citizens:

In the first place, since the behavioral sciences are so very young, imprecise, and changeable, their findings have an uncertain expectancy of life. Today's sanguine assertion may be cancelled by tomorrow's new

revelation—or technical fad. It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions or psychological literature. Today the social psychologists—at least the leaders of the discipline—are liberal and equalitarian in basic approach. Suppose, a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racist notions and label them "science." What then would be the state of our constitutional rights?¹⁰

The evolutionary world view that has provided the focus for the discussion of minority rights in the twentieth century has been, in a very real sense, an ineffective guideline for determining the nature of social equality. Although the belief of intellectual equality among the different races facilitated the elimination of some of the more obvious oppressive features of minority existence in America, it has never uncovered the hidden dimensions of social inequality that the failure of environmental programs and increasing credibility of the hereditarian conviction covers equally as well. Reflecting on Herbert Aptheker's commentary of 1946 that stressed economic exploitation rather than intellectual competence or incompetence of the Negro, Dr. Russel Marks raised the following question:

What social difference does it make if one believes that I.Q. is 60 percent genetic and 40 percent environmentally determined or if one believes, like Jensen, it to be 80 percent genetic and 20 percent environmentally determined?¹¹

Hereditarians are not necessarily winning; rather, their positions are being supported—for other reasons (supposedly). Indeed, what difference does it make if the black person is comparatively bright or stupid? Environmentalists have always explained disproportionate poverty and unemployment among minorities in terms of a lack of opportunity available to them. Perhaps the explanation should finally gather around the nature of economic opportunity itself and the extent to which it exists for Americans in the concluding quarter of the twentieth century.

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CHAPTER ONE: WE ARE SEPARATE BUT EQUAL

Thomas Black
Frank Aquila

Roberts v. City of Boston
5 Cush 198 (1849) (Mass. 1859)

Background: In 1849, the city of Boston supported a class of schools called primary schools that were designated for the instruction of children between the ages of four and seven. At that time, the city was divided into twenty-one districts with approximately one hundred sixty primary schools. By statute, the general management and superintendence over all city schools, including the primary schools, was vested in an elected general school committee. In turn, the general school committee conferred management and control over the primary schools to a primary school committee.

At the time of suit the black population of Boston constituted a one sixty-second (1/62) part of the entire population. Since 1800, separate primary schools had been maintained in Boston, two of which were exclusively devoted to the instruction of black children. There was no law, except a by-law promulgated by the primary school committee, that prohibited blacks from attending white schools. Apparently the separate system was maintained by tacit agreement.

In 1846, a group of black citizens petitioned the primary school committee to abolish the separate school structure. In response, the primary school committee adopted and followed a sub-committee report which stated that:

... [I]n the opinion of this board, the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools is not only legal and just, but is best adapted to promote the education of our population (p. 201).

The plaintiff, Sarah C. Roberts, a five-year-old black girl, lived only 900 feet from the nearest primary school, which was for white children, and 2100 feet from the nearest school designated for black pupils. All totaled, there were five white primary schools in her area that were as close or closer than the one she was required to attend.

In April 1847, Sarah Roberts applied to a member of the district primary school committee, having under his charge the primary school nearest to her place of residence, for an admission ticket. Based solely on her color she was denied admission. Application at the primary and general school committees also resulted in denials, again based solely on race. In February, the plaintiff went to the school nearest her home without an admission ticket, and was physically ejected from school by the teacher.

Sarah Roberts, by her father, sued the city of Boston based on a statute which provided that any child unlawfully ex-

cluded from public school instruction in the commonwealth shall recover damages in an action against the city or town by which such public school instruction is supported.

The plaintiff contended that the exclusion of blacks from the public school was an inconvenience to them, in the nature of a caste, and a violation of equality. The plaintiff also argued that the school committee only had the power to determine qualifications for admission limited to age, sex, moral, and intellectual fitness, and could not consider color as a qualification or disqualification. Moreover, the by-law of the committee, which effectively excluded blacks from white schools, was not legally reasonable. Plaintiff argued:

It is clear that the committee may classify scholars according to age and sex, for these distinctions are inoffensive, and recognized as legal; or according to their moral and intellectual qualifications, because such a power is necessary to the government of schools. But the committee cannot assume, without individual examination, that an entire race possess certain moral or intellectual qualities, which render it proper to place them all in a class by themselves (p. 203).

The plaintiff continued to argue that although the school committees claim no violation of equality inasmuch as they provide the black schools with competent instructors and equal advantages, in reality the schools are not equivalent. It is inconvenient to the black children who must traverse the extra mileage, and it inflicts upon them the stigma of caste. While the matters taught may be precisely the same, "a school exclusively devoted to one class must differ essentially, in its spirit and character, from that public school known to the law, where all classes meet together in equality" (p. 203). Plaintiff asked the court to declare the by-law unconstitutional and illegal.

Court Ruling: As the court perceived the facts and arguments in this case, there was only one issue and that was whether the plaintiff had been unlawfully excluded from the public schools. In answering this, the court first resolved the question of whether the primary school committee had the legal authority to adopt the by-law in question and whether that by-law was a violation of equality. As it turned out, this second issue was dispositive of the first and the court held that the committee did have the power to promulgate the by-law; it was not a violation of equality, therefore, the plaintiff was not unlawfully excluded from the public schools.

The court stated that the legislature gave the power of general superintendence and plenary authority "to the school committees to arrange, classify and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare" (p. 208). In the absence of special legislation on the subject of separate schools, "the law has vested the power in the committee to regulate the system of distribution and classification; and when this power is reasonably exercised without being abused or perverted by colorable pretenses, the decision of the committee must be deemed conclusive" (p. 209).

The court found no abuse of power from the promulgation of the by-law and stated that "the committee, apparently upon great deliberation, have come to the conclusion that the good of both classes of schools will be best pro-

moted by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt that this is the honest result of their experience and judgement" (p. 209). In speaking to the contention that separate schools tend to deepen and perpetuate the "odious distinction of caste", the court stated that the "prejudice, if it exists, is not created by law, and probably cannot be changed by law." Moreover, the court doubted whether community feelings and opinion would change or lessen by compelling the integration of schools. In any event, the proper forum for such a consideration is with the school committees and it cannot be said "that their decision is not founded on just grounds of reason and experience" (p. 209-10).

Slaughter-House Cases

83 Wall. 36 (1873)

Facts: The legislature of Louisiana on March 8, 1869, chartered a corporation—the Crescent City Live Stock Landing and Slaughter Company—and granted to it a twenty-five-year monopoly "to maintain slaughterhouses, landings for cattle and stockyards" to three parishes. The parishes covered an area of 1154 square miles, and contained a population of well over 200,000, including the city of New Orleans. The statute also prohibited all other persons from building, keeping, or having slaughterhouses, landings for cattle, and yards for cattle intended for sale or slaughter within those limits; and required that all cattle intended for sale or slaughter in that district should be brought to the yards and slaughterhouses of the corporation. Moreover, the corporation was authorized to exact certain prescribed fees for the use of its wharves and for each animal landed, and certain prescribed fees for each animal slaughtered. Butchers not included in the monopoly challenged the statute under the thirteenth and fourteenth Amendments, and presented to the United States Supreme Court its first opportunity to interpret the post-war amendments.

Shortly before the statute was to become effective, counsel for the Butchers Benevolent Association sought and was granted a preliminary injunction against the Crescent City Corporation prohibiting the monopoly. Counsel for Crescent obtained a preliminary injunction in another district court in New Orleans against the Butchers Benevolent Association prohibiting them from thwarting the monopoly. The Louisiana Attorney General appeared on behalf of the state in yet another district court and sought injunctions against certain parties affiliated with the corporation. On December of 1869, the several district courts issued permanent, conflicting injunctions. The opposing counsels then agreed to select six cases, out of the more than two hundred brought by or against the corporation, to be appealed to the Louisiana Supreme Court. On April 11, 1870, the court sustained the monopoly statute. The United States Supreme Court, in a 5-4 decision, affirmed the ruling.

Background: Before the Civil War, *Barron v. Baltimore*, 7 Per. 243 (1833) made it clear that the Constitution had a very

narrow impact on the relationships between state governments and individuals. The Supreme Court's position in *Barron* was that the Bill of Rights (the first eight amendments) guarantees applied only to the national government and not to the states, even though state constitutions typically had their own bills of rights. The *Slaughter House* cases raised for the first time the issue of whether the reconstruction amendments had worked such a change in the federal system so as to vest in the Supreme Court the power and duty to strike down state action.

After the war in 1865, and in the midst of concern for the problems of slavery, the Thirteenth Amendment was ratified, giving a constitutional sanction to President Lincoln's wartime Emancipation Proclamation. The Thirteenth Amendment addresses "involuntary servitude" and has uniformly been limited to a proscription against enslavement of any kind excepting punishment for a crime. But the problems of ex-slaves did not end with the new anti-slavery amendment because their rights continued to be severely limited by "black codes" in several states. Accordingly, Congress adopted the Civil Rights Act of 1866, and two years later the Fourteenth Amendment was ratified assuring the validity of the new Act. Unlike the specific language of the Thirteenth Amendment, the Fourteenth uses very general terminology and is not limited to discrimination based on race, color, or previous condition of slavery. The Fifteenth and last post-civil war Amendment was ratified in 1870 and specifically addresses racial discrimination in voting.

As pointed out by Justice Miller in his majority opinion in *Slaughter-House*, it was clear that the immediate motivation for the amendments was the problems of slavery and emancipation. The court's first interpretation of the amendments resisted the dissenters' efforts to give the amendments a content or meaning beyond those problems that gave rise to the amendments. What is also equally clear, with the hindsight of more than a century, is that the post-civil war amendments, particularly the Fourteenth, did change the relationships between state government and the individual, spawning national protection of a wide range of

individual rights. Through selective incorporation, by way of the Fourteenth Amendment, nearly all of the Bill of Rights guarantees have now been made binding on the states, and the doctrine enunciated in *Barron v. Baltimore* has fallen by the wayside.

Court Ruling: In sustaining the Louisiana Statute the majority, speaking through Justice Miller, held that the grant of exclusive rights or privileges to the corporation was a police regulation for the health and comfort of the people within the power of the state legislature, and unaffected by the Constitution of the United States. The bare majority resisted the dissenters' notion that there were fundamental rights entitled to judicial protection against "hostile and discriminating" state legislation.

The majority discussed early English law regarding governmental grants of monopolies and stated that the "power to do this has never been questioned or denied". The authority of the legislature to pass this statute is valid unless restrained by the federal constitution. The court then addressed the arguments of the butchers.

The petitioner (Butchers) argued that the Thirteenth Amendment prohibited "slavery and involuntary servitude" in every form and degree. The petitioner reasoned that the statute imposed an "involuntary burden" on the butcher's chosen profession, similar to the burden imposed on the serfs of feudalistic Europe. The prescribed fee for landing and butchering their cattle was akin to the "thin-lace" of old Scotch law and the "banalities" of seigneurial France. The court summarily dismissed this claim and the dissenters made no serious effort to contest the point. The Thirteenth Amendment was the culmination of the bitter struggle between the states and was a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government". And it would take a "microscopic search... to find in it a reference to servitudes which may have been attached to property in certain localities" [p. 69].

The court next addressed the petitioner's contention that the statute in question deprived "a thousand people, who have acquired valuable property, and who, through its instrumentality, are engaged in a honest and necessary business, of their right to use their own property... and to labor in their honest and necessary business in violation of the privileges and immunities clause of the Fourteenth Amendment" [p. 55]. The majority discussed the history of the post-war amendments, the Fourteenth in particular, and stated that their pervading purpose was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" [p. 71]. The court then stated its intention to give the amendments a narrow construction:

"We do not say that no one else but the negro can share in this protection... but what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these Amendments, it is necessary to look to the purpose which we have said was the prevailing spirit of them all, and the evil which they were designed to remedy..." [p. 72].

Petitioner's main argument was that the statute was in violation of the Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." To the Butchers, "privileges and immunities" were those "personal and civil rights which usage, tradition, the habits of society, written laws, and the common sentiments of people have recognized as forming the basis of the institutions of the country" [p. 55]. But the majority refused to broaden the clause beyond its plain and historical meaning. They rested their decision on the old Articles of Confederation, which also had a privileges and immunities clause, and the case of *Corfield v. Coryell*, Wash. C.C. 371 (1823). The *Corfield* case was the first significant judicial interpretation of the privileges and immunities clause, then in the Articles of Confederation, and held the clause served only as a barrier against certain state discriminations against citizens of other states [affirmed in *Paul v. Virginia* 8 Wall. 168 (1869)]. In relying on these two cases the court stated that the "sole purpose" of the clause "was to declare to the several states, that whatever those rights, as you grant or establish then to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction" [p. 77]. The court then excused itself from defining those privileges and immunities of citizens of the United States which no state can abridge, but suggested several: The right to pass freely from state to state; the right to come to the seat of government to assert any claim upon that government; the right to demand the care and protection of the Federal Government; the right to use the navigable waters of the United States [see pp. 79-80;] see also *Crandell Nevada*, 6 Wall. 36 (1867) and *Twining v. New Jersey*, 211 U.S. 78 (1908)—an early twentieth century attempt to catalogue national "privileges and immunities").

The majority, therefore, held that the rights claimed by the petitioner, "if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the Fourteenth Amendment..." [p. 80].

Justice Miller's position, that the privileges and immunities clause is limited to rights of national as distinct from state citizenship, has still prevailed. It has been relied on only once for a majority invalidation of a state law, in *Colgate v. Harvey*, 296 U.S. 404 (1935), striking down a Vermont tax provision. Even so, the expanding views of due process and equal protection have overshadowed any development of privileges and immunities. The protection of fundamental rights and values, now associated with due process and equal protection considerations, was futilely voiced by the three dissenters in *Slaughter House*. Their opinions smack of the philosophies and teachings of John Locke, Blackstone and Adam Smith. They relied extensively on the Magna Carta as the fount of individual liberties and the foundational bastion against inequitable and discriminating laws. Their exhortations were almost entirely directed at the privileges and immunities issue, and, as a result, there is a dearth of interpretation in the dissent, as well as in the majority opinion, on the issues of due process and equal protection.

Regarding due process the majority stated that "the argument has not been much pressed in these cases that the defendants charter deprives the plaintiffs of their property without due process of law, or that it denies them the equal protection of the law" [p. 800]. The court then noted that the requirement of due process was to be found in the Fifth Amendment as a restraint upon the federal power, and in nearly every state constitution as a restraint upon the power of the states. "This law then, has practically been the same as it now is", and, therefore, "... it is sufficient to say that under no construction of that provision that we have seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of the provision (due process)" [pp. 80-81].

In one of the few passages that discuss the Fourteenth Amendment in terms other than privileges and immunities, Justice Bradley in his dissent took a different view of due process and equal protection as applied to the butchers. He stated "... life, liberty, and property... are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all..." [p. 115]. Moreover, "a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right or choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of equal protection of the laws..." [p. 122].

The petitioner's claim of denial of the equal protection of the law was also summarily dismissed as the court felt that the "prevailing purpose" of the clause was for the protection of the "newly emancipated negroes." The majority ironically put to rest this issue by stating, "We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision" (p. 81).

Selected Bibliography

1. "The Fourteenth Amendment and the Process of Judicial Inclusion", Charles Fairman, *Mr. Justice Miller and the Supreme Court 1862-1889*, Ch. VIII, p. 179, et. seq., Cambridge Mass., 1939.

The author discusses and defends the position of Justice Miller in the *Slaughterhouse* cases. Letters from and to Justice Miller are included that indicate his convictions regarding the ex-slaves, state and federal relations, and the economic impact surrounding this case and related cases. There is much talk of politics, congressional records addressing the intent behind the Reconstruction Amendments, and the privileges and immunities question. It is a good background and personality analysis, but the author goes to great length to defend Justice Miller's position and says very little in support of the other side.

2. "Reconstruction and Reunion 1864-88, Part One", Charles Fairman, *History of the Supreme Court of the United States*, Vol. 6, Ch. XXI, "Privileges of Citizens of the United States: The *Slaughterhouse* cases", p. 1301, et. seq., MacMillian Co., Collier MacMillian, New York and London, 1971.

Here Fairman is more objective. He discusses extensively the background of the *Slaughterhouse* cases, indicating reasons why the statute was enacted, complete names, dates, newspaper articles from several New Orleans publication, the events leading up to the enactment of the statute, the history of the cases going to the Supreme Court and the aftermath. Also, he includes congressional records and the people behind the cases.

3. "The Fourteenth Amendment: The *Slaughterhouse* Cases", William L. Royal 4 *Southern Law Review* 558 (1878).

The author discusses the privileges and immunities questions and cases decided after *Slaughterhouse* bearing on the issue. He also discusses the political movements and policy surrounding *Slaughterhouse* through the use of congressional records.

4. "Due Process of Law Before the Civil War", Edward S. Corwin, 24 *Harvard Law Review* 366 and 460 (1911).

The author analyzes and discusses state and Supreme Court decisions interpreting the notion of due process before the Civil War. He concludes that the doctrine of due process was a restrictive check on the powers of state rather than a grant of rights to the citizens of the state.

5. "The Conspiracy Theory of the Fourteenth Amendment", Howard J. Graham, 47 *Yale Law Journal* 371, continued at 48 *Yale Law Journal* 171 (1939).

This article discusses the history of the Fourteenth Amendment. Graham discusses the proposition, advanced several years after the *Slaughterhouse* decision, that the certain members who drafted the Fourteenth intentionally used the word "person" instead of "citizens" in the due process and equal protection clauses in order to include corporations under its protection. This intentional oversight argument sounded the "death knell" of the narrow "negro-race theory" expounded in *Slaughterhouse*, and cleared the way for modern development of due process and equal protection, and of the courts discretionary powers over social and economic legislation. The author debates the "conspiracy theory" and concludes that there really was such an intention, but it was irrelevant since corporate rights were being developed prior to the Amendment's adoption in 1866.

6. "The Federally-Secured Right to be Free from Bondage", Sydney Brodie, 40 *Georgetown Law Review* 367 (1952).

The author discusses federal laws prohibiting slavery, involuntary servitude, and peonage and the rights pro-

tected thereunder. He also analyzes cases brought under those statutes, the Thirteenth Amendment, and *Slaughter-House*. He calls for a modernization of the laws.

7. "The Privileges and Immunities Clause: It's Hour Come Round at Last?" Philip B. Kurland, *Washington University Law Quarterly*, 1972, p. 405.

The author discusses the history, intent and function of the clause by resorting to legislative records. He delves into the *Slaughter-House Cases*, *Confield v. Coryell*, *Crandall v. Nevada*, *Twining v. New Jersey* and others interpreting the clause. He also discusses the cause for the non-development of the clause, recent cases, and the possibility for future constitutional development of the privileges and immunities clause.

Plessy v. Ferguson
163 U.S. 537 (1896)

Background: The separation of the races by force of law is a historic institution in the United States. Many states made constitutional and statutory provisions that delineated the types of relations which were subject to race separation. Those included passengers on common carriers, patrons of places of public recreation and amusement, fellow students at educational institutions, and marriage partners. The impact of the Fourteenth Amendment on the validity of state-enforced segregation was virtually insignificant as interpreted by state courts and the Supreme Court in *Plessy*. Early decisions addressing segregation practices required only that the separated group be offered facilities or services substantially equal to those available to the white population. The courts refused to go beyond the stated purposes of the statutes at issue, and dogmatically adhered to the notion that segregation does not mean inferiority. Perhaps the first case ever to review the law of state-enforced segregation was *Roberts v. City of Boston*, 5 Cush. 178 (1849), which upheld a segregated school statute, partly on the basis that, although separate, such facilities were equal in quality. Following the Civil War and after the adoption of the Thirteenth and Fourteenth Amendments, the Supreme Court of Ohio was confronted with a challenge to its system of segregated schools under both the state and federal constitutions. *State ex. rel. Gaines v. McCann*, 31 Ohio St. 178 (1872). The Fourteenth Amendment challenge was quickly disposed of and segregation was upheld so long as full equality of facilities was provided.

In the next several years the *Roberts* and *McCann* decisions served as precedents for judicial approval of legally enforced separation. In 1874, the Indiana Supreme Court, in *Cory v. Carter*, 48 Ind. 327, relied on the *McCann* decision as "compelling authority" supporting segregated education in the Indiana school system. Judicially sanctioned segregation soon followed in the California school system, *Ward v. Flood*, 48 Cal. 36 (1874), and again *Roberts* was used as decisive authority. Even in the face of a Louisiana constitutional provision that required all children to be admitted to the common schools without distinction of race and specifically prohibited separate schools, a federal court held that the present segregated system of schools was "purely a domestic institution", as opposed to state action which could invoke federal law and the Fourteenth Amendment, and dismissed the case for want of jurisdiction. *Bertonneau v. Board of Directors of City Schools*, 3

Fed. Cas. 294 (1878). Again the *McCann* and *Roberts* decisions were relied upon.

The *Roberts* case was perhaps the leading authority supporting racial segregation in public education, and courts ordinarily interpreted "separate but equal" as authorizing no gross discrimination in the educational advantages offered to the two races. Where gross inequality existed, courts were not reluctant to invalidate the separation, although the showing of inequality had to be "clear and convincing." *Dawson v. Lee* 83 Ky. 49 (1885), *Coger v. Northwestern Union Packet Co.*, 37 Iowa 145 (1873).

In the field of public transportation, racial segregation was also subjected to judicial scrutiny, but the separation was generally accepted as valid public policy in states during the latter part of the nineteenth century. In this instance many cases failed to raise Fourteenth Amendment issues either because the amendment, as has always been interpreted, is restricted to state action; and the promulgation of racially segregated regulation was held to be private action [e.g., *Civil Rights Cases*, 109 U.S. 3 (1883)] or because the challenge involved the commerce clause [e.g., *Hall v. DeCuir*, 95 U.S. 485 (1877)].

The underlying rationale is the "separate but equal" doctrine, as defined or expressed before *Plessy*, and whether applied to public schools, public transportation, or whatever, is multifarious. Many courts perceived that a transportation company had the common law right, as a carrier, to make reasonable regulations regarding and controlling the comfort, management and transportation of passengers (i.e. police powers), and the ultimate question was whether the regulation was reasonable. *Commonwealth v. Power*, 7 Merc 601 (Mass. 1884); *Hibband v. Erie Railroad*, 15 N.Y. 455 (1857); *Miners Central Railroad Co. v. Whittemore*, 43 Ill. 520 (1867); *Gray v. Cincinnati Southern R. Co.*, 11 Fed Rep. 685 (1882); *Smoot v. Kentucky Central Ry. Co.*, 13 Fed Rep. 337 (1883). Others found that segregation tends to preserve the good order and promote peace. *Westchester & Philadelphia R. Co. v. Miles*, 55 Pa. St. 209 (1867); *Smith v. Chamberlain* 17 S.E. 371 (1883). Still other courts validated racial segregation because of egregious racial ideas. *Grines v. McCandless*, 4 Phila. 255 (1861).

While there was a general disposition among the state courts to enforce segregation of the races, several courts took a different view based on provisions in their own constitutions but similar to those found in the Fourteenth

Amendment and the Civil Rights Act [e.g., *Board of Education v. Tinnon*, 26 Kan. 1 (1881)]. The court in *Tinnon* later upheld segregation in schools after the Kansas legislature expressly provided for it. [See *Reynolds v. Board of Education*, 66 Kan. 672 (1903). See also *Clark v. Board of Directors* 24 Iowa 266 (1868); *Ferguson v. Gies*, 82 Mich. 358 (1890), specifically rejecting the *Roberts* decision; *People v. Board of Education*, 101 Ill. 308 (1882).]

In 1873, the Supreme Court was confronted with its first opportunity to judicially interpret the "separate but equal" proliferation in *Railroad Co. v. Brown* [84 U.S. 445, 7 Wall. 445]. In the face of a congressional enactment for the District of Columbia which mandated that "no person shall be excluded from the cars on account of color", Cathrine Brown was physically ejected from a "white" car by the railroad company officials because she was black. The company unsuccessfully pleaded to the jury that separate but equal cars complied with the statute, and, in the Supreme Court, it argued that "risking and enforcing the separation of races in its cars" was "reasonable and legal". The Supreme Court unanimously rejected the "separate but equal" argument as an "ingenious attempt to evade compliance with the obvious meaning of the requirement" [at 452]. Further, Congress, in the belief that this discrimination was unjust, acted. It told the company, in substance, that it could extend its road into the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, must be placed in equality [at 453]. Twenty-three years after *Brown*, the court adopted a different view.

In 1890, the state of Louisiana adopted a statute that required railway companies carrying passengers in their coaches in that state to provide equal but separate accommodations for white and Negro passengers. This was accomplished by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition. The statute also provided that no person shall be permitted to occupy seats in coaches other than the ones assigned to him by the officers of the passenger trains. Non-compliance with the assignment of seats or officers instructions resulted in a penalty of a fine and/or imprisonment. Moreover, the statute empowered the train officers to refuse carrier services to anyone who refused to occupy the seat assigned to him and exempted the railroad company from liability for refusing services. (This liability immunity was declared unconstitutional by the court.)

Petitioner Plessy, a U.S. citizen and resident of Louisiana, was a railroad passenger who took possession of a vacant seat in a coach designated for "whites". The conductor ordered Plessy to occupy another seat in the coach for non-whites but he refused. Thereupon the conductor, with the aid of a police officer, forcibly ejected Plessy from the coach and imprisoned him in the parish jail of New Orleans. He was held there to answer criminal charges for violation of the above 1890 statute.

Plessy was brought before the criminal district court for the parish of New Orleans and pleaded the unconstitutionality of the statute as a defense to the charges. The district court overruled the plea, and Plessy then sought a writ of prohibition against the judge of the criminal district court, John H. Ferguson, in the state Supreme Court, asking for a determination of the constitutionality of the statute and a

prohibition against the imposition of the fine and penalty. The Louisiana Supreme Court held that the prosecution was constitutional and denied relief. *Ex Parte Plessy*, 11 So. 948, 45 La. Ann. 80 (1892). Petitioner appealed to the United States Supreme Court, attacking the statute on the grounds that it conflicted with both the Thirteenth and Fourteenth Amendments. The Supreme Court, speaking through Justice Brown, found no merit in either contention and affirmed the Louisiana Supreme Court.

Court Ruling: The constitutionality of the Louisiana statute was challenged on the grounds that it was contrary to both the Thirteenth and Fourteenth Amendments.

The Thirteenth Amendment was given little consideration. The court merely adopted and reaffirmed the analysis used in the *Slaughter-House Cases* and disposed the contention.

The Fourteenth Amendment argument was likewise rejected. The court stated that the purpose of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, "... but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either" [p. 544]. The court went on to echo the then common judicial sentiment that "laws permitting, and even requiring, (segregation) do not necessarily imply the inferiority of either race to the other". The court also noted the almost universal entrenchment of segregational practices in state legislatures, citing the *Roberts* decision and state-enforced segregation in education as common examples. Of course, a long-standing disregard of the equal rights of a minority does not validate a continuance of such disregard.

The Court then made a sharp, albeit fictional, distinction "... between laws interfering with the political equaling of the negro and those requiring the separation of the two races" [p. 545]. Or put another way, the separation of the races on common carriers, in schools, and so forth, concerns the social relations of men rather than the civil or political rights, the latter standing upon a higher plane:

• If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane. [pp. 551-2].

The court cited *Strauder v. West Virginia* [100 U.S. 303 (1880)] as an example of a legal or political right protected by the Constitution. In *Strauder* the Supreme Court struck down a West Virginia law which limited to white male persons, 21 years of age and citizens of the state, the right to sit upon juries. The total exclusion of the black race, as the *Plessy* court put it, implied a "legal inferiority in a civil society", lessened "the security of the right" to sit upon juries, and reduced "them to a condition of servility" [p. 545]. It should be noted, however, that there is nothing in the Fourteenth Amendment to suggest such a distinction where state action is involved (i.e., the distinction between civil and social rights).

The court continued, and implicitly stated, that since the relations of passengers upon intrastate common carriers

were social and not political, such relations were subject to and within the control of the state in its ordinary exercise of police power. But such power, whether in the form of statutes or regulations, must be "enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class" [p. 550], citing *Yick Wo. v. Hopkins* [118 U.S. 356 (1886)].

The court then specifically examined the Louisiana statute to ascertain if it was reasonable, and, thus, an ordinary exercise of police power. Conceding that there must "necessarily be a large discretion on the part of the legislature", the determination of reasonableness can be made "with reference to the established usages, customs and traditions of the people, and with a view of the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that (the statute) is unreasonable. . . ." [pp 550-1].

The court then considered the plaintiff's argument that "enforced separation of the two races stamps the colored race with a badge of inferiority". The majority stated that "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it" [p. 551]. The majority believed that mere separation of the races on a common carrier, so long as equal facilities are provided, is not discriminatory and grants the separated group with no badge of inferiority. Further, social prejudices cannot be overcome by legislation and "equal rights cannot be secured to the negro. . . by an enforced commingling of the two races" [p. 551]. Moreover, the court felt that separation of the two races simply lent a legal recognition to fundamental and ineradicable differences which the law was powerless to remove. They stated: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation" [p. 551].

The first Justice Harlan dissented:

In respect of civil rights, common to all citizens, the constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have redress to the race of citizens when the civil rights of those citizens are involved. . . [pp. 554-5].

Addressing the "separate but equal" doctrine, Justice Harlan stated:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that (the statute) had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . The thing to accomplish was, under the guise of giving equal accommodation for

whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. . . [pp. 556-7].

He continued:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . [p. 559]. If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens - our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done [p. 562].

Selected Law Review Articles

1. "The Negro in the Supreme Court", Edward Waite, 30 *Minnesota Law Rev.* 219 (1946).

The author traces the attitudes and decisions of eight prominent Supreme Court Justices and their courts, and concludes that there has been a general trend toward an increasingly liberal recognition of the civil and political rights of the black citizens. The history and case development of the Thirteenth, Fourteenth and Fifteenth Amendments is discussed. The author points to protective federal legislation in sundry areas, but admits there remains the then still segregated field of education to be overcome.

2. *The Coming Vindication of Mr. Justice Harlan* Richard F. Watt, 44 *Ill. Law Rev.* 13 (1949).

The author discusses the historical sides of the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866. He shows how the law, in many fields, has shown a remarkable tendency to find its way to Justice Harlan's dissenting opinions. He also discusses southern politics and the decline of southern power in 1948.

3. *Segregation and the Equal Protection Clause*, Brief for the Committee of Law Teachers Against Segregation in Legal Education. Thomas J. Emerson, John P. Frank, Alexander H. Frey, Erwin N. Griswold, Robert Hale, Harold Havighurst and Edward Levi. 34 *Minnesota Law Rev.* 289 (1950).

This is the amicus curiae brief filed on behalf of the above-mentioned committee in the U.S. Supreme Court in the case of *Sweatt v. Painter et al.* The author's basic position is that segregated legal education violates the equal protection clause of the Fourteenth Amendment, advancing three cogent arguments: (1) The first is that the equal protection clause was intended to outlaw segregation. (2) The basic policies underlying the court's approval of segregation in *Plessy v. Ferguson* have in the intervening years, proved to be not only wholly erroneous, but seriously destructive of the democratic process in the United States and (3) segregation should not be extended to education because it is unreasonable.

4. "Segregation and the Fourteenth Amendment", M.D. Hyman, 4 *Vanderbilt Lsn. Rex.* 555 (1951).

The author historically analyzes the Fourteenth Amendment citing several prominent historians, in the contexts of slavery, the *Plessy* case segregation, and state versus federal rights. The author also discusses state action that directly and indirectly furthers segregation in the areas of housing development, education, public recreation facilities, and employment. Private discrimination and the reach of the Fourteenth Amendment is also discussed. The author calls for judicial and legislative action to put an end to segregation. The author feels that such action will alter and influence living styles and force a commingling of the two races that will lead to improved social relations, notwithstanding *Plessy* and the judiciary's perceived common sentiment of the people.

5. "The Constitution, Education, and Segregation," Robert J. Hannis, 29 *Temple Law Quarterly* 409 (1956).

The author discusses the development of the separate but equal doctrine and "Jim Crow" laws, citing *Roberts*, *Plessy* and others. He asserts that the majority opinion in *Plessy* is "permeated with faults of omission and commission" and presents arguments emphasizing the points. He applies and analyzes the doctrine to segregated education and discusses the cases of *Gaines*, *Sweat*, *McLaurin* and others. The author also discusses the public school segregation cases (*Brown*) and the concomitant demise of the "separate but equal" doctrine.

6. "The Constitutionality of Educational Segregation," Note, 7 *George Washington Law Quarterly* 208, (1949).

The author discusses several then recent cases including the older *Plessy* case. He asks why the norms of inequality and/or segregation have failed to yield and answers: They've remained intransigent because (1) "Negroes have been slow to bring actions," (2) they (blacks) have lost cases in courts, and (3) because "their successes in courts have not always resulted in equalizing changes outside the courts."

7. "The Fourteenth Amendment and the Separate but Equal Doctrine," Joseph D. Ransmeier, 50 *Michigan Law Rev.* 203 (1951).

Ransmeier discusses the development of the "separate but equal" doctrine citing the *Roberts* and *McCañ* decisions, among others, and gives a good analysis of the *Plessy* case. He also delves into the spread of the doctrine in a myriad of areas and discusses the then recent cases challenging segregation.

Missouri ex. rel. *Gaines v. Canada* 305 U.S. 337 (1938)

Background: Decided in 1896, the landmark decision in *Plessy v. Ferguson*, 163 U.S. 537, gave judicial sanction to the "separate but equal doctrine" (although the court never used that precise wording) in the interpretation of the equal protection clause of the Fourteenth Amendment. The main argument in the case centered around the Fourteenth Amendment. While recognizing that the purpose of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law, the court stated that "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or (to enforce) a commingling of the two races upon terms unsatisfactory to either". 163 U.S. 537, 544. The court pointed out that segregation had been accepted by other courts as a proper exercise of the state's police power. It referred to *Roberts v. City of Boston*, 5 Cush 198 (Mass. 1859), upholding the separation of the two races in public schools, to state court decisions upholding legislation

separating the races on common carriers, and to a state court decision upholding an anti-miscegenation statute.

The *Plessy* decision did not authorize or sanction all state segregation legislation since any such legislation, to be constitutional, must fall within the police powers of the state and be reasonable in nature. Moreover, to validate state enforced segregation it was necessary to establish that the two races stood on equal footing in the enjoyment of privileges. Whether there was equality in fact was open to judicial scrutiny.

That racial segregation in the enjoyment of common carrier services was a reasonable exercise of the state's police power was established by *Plessy*. In this vein the only basis for attacking segregation practices in intrastate transportation was through the equal protection clause of the Fourteenth Amendment; and the only question open for judicial consideration was whether the two races, in fact, enjoyed equal accommodations. Based on this premise, the Supreme Court in *McCabe v. Archison, T. & S.F. Ry. Co.*, 235

U.S. 151 (1914), held invalid much of a state statute which permitted carriers to provide certain first-class traveling facilities to whites while denying them to blacks. The *McCabe* holding of substantial equality of facilities played a key role in the court's analysis in the *Gaines* decision.

As was noted by the court in *Plessy*, segregation of the races in public schools was an established practice. The court specifically mentioned the segregation statutes for schools in the District of Columbia, pointed to racial segregation in public education in some of the northern schools both before and after the Civil War, and referred to decisions of state courts sustaining segregation in public schools. However, the *Plessy* decision dealt with statutes providing for racial segregation on transportation facilities. Public school segregation was not at issue, but through an uncriticized analogy between railroads and schools and what could be termed as Supreme Court passivity, the practice of educational segregation was written into constitutional law. This metamorphosis was effectuated on the strength of the Supreme Court's decisions in *Cummings v. Board of Education* and *Gong Lum v. Rice*.

Cummings v. Board of Education, 175 U.S. 528 (1899), was one of the first cases to reach the court in the area of school segregation after *Plessy*. There a unanimous court denied relief to black taxpayers who sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until such time as the board resumed operation of a high school for black children. It should be pointed out, however, that the plaintiffs did not challenge the validity of segregated education, so that all the court could decide was the issue of discrimination arising from the closing of the black high school and the adequacy of other facilities for black high school pupils. As an afterthought, Justice Harlan, the lone dissenter in *Plessy*, stated for the majority in *Cummings* that "the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the Supreme law of the land" [*Cummings*, p. 545].

Cummings can hardly be construed as strong precedent supporting racially segregated education, and aside from Justice Brown's dictum in *Plessy* in which he equated education and transportation to uphold segregation in the latter, it was not until 1927 in *Gong Lum v. Rice*, 275 U.S. 78, that the court expressly extended the "separate but equal" doctrine to encompass public school education. Again, the plaintiff, *Gong Lum* did not challenge the *per se* validity of segregation in public schools, but merely contended that his daughter was denied equal protection of the laws when she was classified as "colored" and excluded from a white school. The power of the state to classify children as "colored" was upheld by a unanimous court. Moreover, the power of the state to regulate public education was clear, based on the authority of the *Cummings* decision. The majority, speaking through Chief Justice Taft, then proceeded to go beyond the necessities of the case and stamp with constitutionality public school segregation laws on the basis of *Plessy*, *Roberts*, and other state and federal court decisions upholding segregation laws. Again, the language "separate but equal" was not specifically mentioned.

It was common practice in the southern and border states, where the principle of race segregation in the schools was upheld, to maintain separate school systems from elementary to collegiate levels; but the small proportion of black aspirants to professional and graduate degrees made separate higher institutions impractical. In order to furnish substantially equal facilities, as required by the Constitution through interpretation, several states provided scholarships to professional schools outside of the state where segregation was outlawed. The number and amount of the scholarships varied. Prior to *Gaines* only one state court had passed on the constitutional validity of the out-of-state scholarship plan. A Maryland court in *University of Maryland v. Murray*, 169 Md. 478 182 A. 590 (1936), held that such a provision did not afford equal protection under the Fourteenth Amendment on the ground that the amount of the particular scholarship was inadequate. The court, however, expressly left open the question of whether "with and in any amount (it would be) sufficient to send the Negroes outside the state for the education" [at 487]. The question of whether an out-of-state scholarship device was consonant as a matter of principle with the equal protection guarantee of the Fourteenth Amendment was answered by the Supreme Court in *Gaines*.

While the Supreme Court made it clear in its *McCabe* decision in 1914 that separate facilities must be substantially equal, it was not until 1938 in the *Gaines* case that the adequacy of the separate educational facilities was challenged. The *Gaines* case was the first case which involved the validity of segregation in state institutions for higher education. It was also the first education case in which the court directly applied the "separate but equal" doctrine, and the first case in which state action excluding a black from a publicly supported school was held unconstitutional.

The state of Missouri provided separate schools and universities for the education of blacks and whites. The state constitution mandated that separate free public schools be established for the "education of children of African descent," and, by statute, provided for separate high school facilities for black students. While there was no constitutional provision or statute requiring separation for the purpose of higher education, the Missouri State Supreme Court on a comprehensive review of the state statutes held that there was an intention to separate the two races for that purpose also. Lincoln University was established for the higher education of blacks, and the University of Missouri was reserved for the sole education of whites. Ostensibly, and as asserted by the state, the two schools were substantially equal, except that Lincoln University had no educational programs beyond the undergraduate level.

Petitioner, Lloyd Gaines, was a black citizen of Missouri. In August, 1935, he graduated with a Bachelor of Arts degree at Lincoln University. Desiring to enter the study of law, Gaines filed an application with the University of Missouri since there was no law program at Lincoln. His application was denied, but the registrar at the University of Missouri referred him to the president of Lincoln University and the latter directed petitioner's attention to the following statute:

9622 may arrange for attendance at university of any adjacent state - tuition fees. Pending the full development of the Lincoln University the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; provided that whenever the board of curators deem it advisable they shall have the power to open any necessary school or department. [Law 1921, p. 86-7]

Petitioner was advised to apply to the state superintendent of schools for aid under the statute. It was admitted at trial that petitioner's "works and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were otherwise eligible." He was refused admission upon the sole ground that it was "contrary to the constitution, laws and public policy of the state to admit a negro as a student in the University of Missouri." There were schools of law in four adjacent states that admitted nonresident blacks—Kansas, Nebraska, Iowa and Illinois.

Asserting that the state's refusal to admit him to the University of Missouri constituted a denial by the state of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought an action for mandamus to compel the curators of the University to admit him. On final hearing the writ of mandamus was denied. The state Supreme Court affirmed. 113 S.W. 2d 783. The United States Supreme Court reversed the decision.

After holding the action of the curators of the University of Missouri and Lincoln University to be state action within the meaning of the Fourteenth Amendment, Chief Justice Hughes, speaking for the majority, proceeded to apply the "separate but equal" doctrine to the factual situation in the present case.

The lower Missouri State Court (the Supreme Court of Missouri at 113 S.E. 2d 783) placed great emphasis on the adequacy and substantial equality of the advantages offered to blacks under the statute. The respondent state sought to distinguish the case before the court from the Maryland case (*University of Maryland v. Murray*) by showing that while the State of Maryland had expressed no intention to provide, within its borders, for the legal education of blacks, the Missouri legislature had declared such an intent, and was merely providing temporary extra state accommodations pending the establishment of a law school at Lincoln University. The Court stated that the establishment of a law school at Lincoln University had not "ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough" [p. 346]. Nor was there a "mandatory duty", as asserted by the state, on the curators to establish a law school upon proper application under the statute, since the establishment is mandatory only "whenever necessary and practicable in their (curators) opinion." 9618 R.S. Mo. 1929. This qualification of duty permits the curators to exercise their discretionary judgment as to when it will be necessary and practical to establish a law school at Lincoln University. If the curators

deemed such an establishment impractical, no law school would be created.

The respondent further asserted that their duty to provide all of the state's citizens with substantially equal opportunities and facilities would be discharged upon offering to black applicants the means to obtain professional training in another state (as provided in 9622). The state stressed the advantages and opportunities that are afforded to blacks by the law schools in the adjacent states, and pointed out the school's high quality in terms of faculty and curriculum. The state asserted that the "system of education in the (adjacent states) is the same as that in (Missouri) and is designed to give the students basis for the practice of law in any state. . . ." [p. 348].

The Supreme Court refused to weigh or consider the adequacy of the substituted arrangements because those matters were "beside the point." Instead, it squarely faced what it considered the basic constitutional question involved — "whether the provision for the legal education in other states of Negroes resident in Missouri is sufficient to satisfy the constitutional requirements of equal protection. . . ." [p. 348]. The court stated that the "basic consideration is not as to what sort of opportunities other states provided, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color" [p. 349]E. The constitutionality of laws separating the races in the enjoyment of privileges was held to depend upon the quality of those privileges given to the separated groups. In the facts at hand, the question then became one not of the duty of a state to provide legal education or of the quality of education provided, "but of its duty when it provides such training to furnish it to the residents of the state upon the basis of an equality of right" [p. 349].

Since the state provided legal training within the state for whites and denied it to blacks by requiring them to go outside the state, the court held this to be a denial of equal rights "to the enjoyment of the privilege" which the state set up. Further, the "provision for the payment of tuition fees in another state does not remove the discrimination" [pp. 349-50]. The court continued and emphasized that "manifestly, the obligation of the state to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained" [p. 350]. The state's obligation to give equal protection of its laws to those within its borders "cannot be cast by one state upon another and no state can be excused from performance by what another state may do or fail to do" [p. 350]. Moreover, the court found it "impossible" to conclude that what would otherwise be an unconstitutional discrimination can be justified by requiring parties to resort to opportunities elsewhere. The resort "may mitigate the inconvenience of the discrimination but cannot serve to validate it" [p. 350].

The fact that there was little demand for the legal education of blacks was regarded as immaterial, inasmuch as the right to equal protection does not depend upon the number of persons affected. On the contrary,

'the essence of the constitutional right is that it is a personal one. . . it is the individual who is entitled to the equal protection of the laws, and if he is denied. .

a facility or convenience... which under substantially the same circumstances is furnished to another... he may properly complain that his constitutional privilege has been violated' [p. 351].

The court cited *McCabe v. Archison, I. & S.F. Ry. Co.*, 235 U.S. 151, at 161 (1914). Here petitioner's right was a personal one. He was entitled to the equal protection of the laws, and the state was bound to furnish him, within its borders, facilities for a legal education substantially equal to those which the state afforded the white race, whether or not other blacks sought the same opportunity.

The fact that the discrimination might be temporary, pending the establishment of a law department at Lincoln University, was held to be "unimportant" and inexcusable. This was so because the discrimination's possible indefinite continuance depended upon the exercise of a broad discretion by the curators of Lincoln University to organize a law school.

Sweatt v. Painter
339 U.S. 629 (1950)

Background: The Supreme Court's decision in *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938), marked a shift in the approach the court employed in analyzing the problem of enforced segregation. Emphasis was placed on the individual nature of constitutional rights, which rights are both personal and present. Equal protection is not provided by dealing with groups of persons as groups and according equal treatment to the members on some sort of general average basis. The case also illustrated the court's awareness of a national interest toward the vindication of minority rights.

While the court in *Gaines* did not reject the concept of "separate but equal" as enunciated in *Plessy v. Ferguson*, it did shift to a more exacting standard of equality than had previously been employed. In *Gaines*, the court held that the equal protection clause gave to the plaintiff a personal right to require the state of Missouri "to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race" [p. 351]. This made it clear that payment of tuition and expenses at out-of-state schools did not satisfy the constitutional requirement. However, the decision was interpreted by state and federal lower courts to permit a separate law school for blacks in Missouri, and other states, and still comply with the Constitution. Before the *Sweatt* and *McLaurin* decisions in 1950, several equal protection challenges were directed at the adequacy of the separate professional school systems. Although the Supreme Court side-stepped the adequacy issue, it seemed clear that the court was predisposed to invalidate the separate school system in professional education given the correct fact situation properly raising the issue.

In *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1949), petitioner, conceded to be qualified to receive the professional legal education offered

The Supreme Court concluded that the remedy by mandamus was a proper one and the petitioner was entitled to admission to the law school of the State University in the absence of any other and to proper provision for his legal training within the state.

The *Gaines* decision established the unconstitutionality of the out-of-state scholarship device for non-white students aspiring to degrees beyond the undergraduate level at institutions for higher learning. The implication is that as long as such professional institutions are established within a state's borders they may be separate, but must still be substantially equal. The court did not discuss the *per se* constitutionality of segregation in public education, nor did it examine the validity of the separate but equal doctrine established in *Plessy*. Nonetheless, the doctrine, under *Gaines*, appeared to remain a viable fiction, but the court showed signs of assuming a more active role in invalidating legislation or state action resulting in substantially unequal facilities or opportunities for non-white students.

by the state, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the state. She was denied admission solely because of her color. The writ of mandamus was denied by the State Supreme Court. In reversing that judgement, the United States Supreme Court held that petitioner was entitled to secure a legal education afforded by a state institution and that the "State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment, and provide it as soon as it does for applicants of any other group" [p. 633, citing *Gaines*].

The state of Oklahoma complied with the order by establishing a separate law school for blacks within one month after the decision. The petitioner refused to attend the separate school. Again the case came before the court, under the name of *Fisher v. Hurst*, 333 U.S. 147 (1948), and the only issue the court decided was whether or not the mandate or order in *Sipuel* was followed. The court found no violation of the decree. Justice Rutledge dissented:

(The original decision)... plainly meant, to me at any rate, that Oklahoma should end the (discrimination) practiced against petitioner at once, not at some later time, near or remote. It also meant that this should be done, if not by excluding all students (from law school), then by affording petitioner the advantages of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction [pp. 151-52].

Rutledge continued:

... obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the State's long-established and well-known State Uni-

versity law school. . . Nor could the necessary time be taken to create such facilities, while continuing to deny them to petitioner, without incurring the delay which would continue the discrimination our mandate required to end at once [p. 152].

Two years later the court squarely addressed the problem of the state creating makeshift professional schools and then claiming them to be substantially equal in order to comply with the equal protection requirement. In the companion case, the court also addressed the problem of intramural segregation within the university as a denial of equal education opportunity.

Facts: In February, 1946, Herman Sweatt applied for admission to the School of Law of the University of Texas as a first year student. It was admitted that he possessed every essential qualification for admission, except that of race, upon which grounds alone his application was denied pursuant to Section 7 of Article 7 of the Texas Constitution Vernon Ann. St. which reads: "Separate schools shall be provided for the white and colored children and impartial provision shall be made for both."

In May, 1946, Sweatt filed suit for writ of mandamus against the President, Board of Regents, Dean of the School of Law, and Registrar of the University of Texas to compel his admission. Sweatt contended that the denial constituted an infringement of rights guaranteed to him under the equal protection clause of the Fourteenth Amendment to the Federal Constitution. At the time of the suit there was no law school in Texas which admitted blacks, nor was there a separate law school for blacks.

The state trial court recognized that the action of the state in denying Sweatt the opportunity to gain a legal education while granting it to others deprived him of equal protection of the laws. However, the writ of mandamus was not granted, but was continued for six months until December, 1946, to allow the state to supply substantially equal facilities for petitioner to obtain a legal education. At the expiration of the six months, the trial court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for blacks. Petitioner appealed the trial court's denial of the writ, and while that appeal was pending, such a school was made available; but petitioner refused to register in any separate school.

The Texas Court of Civil Appeals set aside the trial court's judgement and ordered the cause remanded to the trial court for a hearing on the issue of equality of educational facilities at the newly established law school as compared with the University of Texas law school. The trial court found that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equal to those offered by the State to white students at the University of Texas." The Court of Civil Appeals affirmed this finding. 210 S.W. 2d 442 (1958). The Texas Supreme Court declined to review the case, but the United States Supreme Court granted certiorari "because of the manifest importance of the constitutional issues involved."

The Supreme Court looked beyond the purported equality found by the Texas trial court, and sharply contrasted the two schools in terms of quality and quantity. The University of Texas Law School had 16 full-time and part-time

professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an order of the coil affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for blacks had five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association, and one alumnus admitted to the Texas bar. Moreover, the law school to which Texas was willing to admit petitioner excluded from its student body members of the racial group which number 85% of the population of the state (whites). The group included most of the lawyers, witnesses, jurors, and judges and other officials whom the petitioner would inevitably have dealt with if he became a member of the Texas bar. The Supreme Court reversed the Texas appeals court because of those inequalities and others, and held that the legal education offered petitioner was not substantially equal to that which he would have received if he was admitted to the University of Texas Law School, and that the equal protection clause of the 14th Amendment required that Sweatt be admitted to the University of Texas Law School.

Court Ruling: The Sweatt case and the companion case, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), presented different aspects of the same general question: To what extent does the equal protection clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Counsel for petitioner, which included Thurgood Marshall, urged the court to reconsider the *Plessy* decision and those subsequent decisions which relied on *Plessy* to validate systems of enforced segregation, and to rule on the validity of segregation in the context of state supported public schools. The Supreme Court, however, refused to consider most of the "excellent research and detailed argument" presented in the two cases because it was unnecessary to their disposition.

This refusal stems from the court's traditional reluctance to extend constitutional interpretation to situations or facts not before the court. However, a unanimous court proceeded to look beyond the mere semantics of the "separate but equal" doctrine. The court did not find "substantial equality in the educational opportunities offered white and negro law students by the State." The court drew egregious differences between the two law schools with respect to (1) the size and quality of their facilities, (2) the size of their respective libraries, (3) the existence of a law review at the University of Texas and the lack of one at the black school, (4) the accredited status of the white law school and the absence of such status at the other, and (5) the positions of distinction and power occupied by the alumni of the University of Texas in the legal profession and public life of the state and nation in startling contrast to the solitary alumnus of the black law school. Moreover, to further demonstrate the patent inequality of the two schools the court stated:

What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position

and influence of the Alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close. [p. 634].

The court also referred to the law as a highly learned profession, to law school as a proving-ground for legal learning and practice which cannot be "effective in isolation from the individuals and institutions with which the law interacts" [p. 634]. The study of law cannot be effectual in an "academic vacuum removed from the interplay of ideas and the exchange of views" [p. 634]. By excluding from the black law school 85% of the population of Texas, including most of the lawyers, witnesses, jurors, judges and other officials with whom the petitioner would be dealing as an attorney, the state was in another way denying him substantially equal education.

The court reiterated that since petitioner's rights are personal and present, he "was entitled to equal protection of the laws." The State of Texas was bound to furnish him a "legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity" [p. 635, the court citing *Gaines*].

Relying on the *Gaines* decision and others, the court held that the "petitioner may claim his full constitutional right: legal education equivalent to that offered by the state to students of other races. Such education is not available to him in a separate law school as offered by the State" [p. 635-6].

Impact of Sweatt & McLaurin: What the *Sweatt* case firmly established was that separate educational facilities for blacks and whites in state supported graduate and professional schools can never be equal. It was now possible to show that a newly created professional school was unequal by use of quantitative measurements such as faculty size, floor space, and library size, as well as by use of qualitative measurements such as reputation and prestige of faculty and alumni, and opportunities for contacts with fellow professionals.

McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), decided the same day, fortified the *Sweatt* decision by proscribing discriminatory segregational action once a state university admits a student to its graduate or professional school. McLaurin had been admitted as a graduate in education by the University of Oklahoma upon the order of a federal district court. But upon admission he was subjected to varying degrees of discrimination made mandatory by amendments to the state law and enforced by the president of the university under various rules and regulations. McLaurin was required to sit at a designated desk in an anteroom adjoining the main classroom (later he was permitted to sit in a classroom row designated "for coloreds"), to sit at a designated table in the library, and to sit at a specified table and eat at different times from other students. McLaurin applied to the federal district court for relief but was denied. He then appealed to the Supreme Court.

During the appeal and before the court's decision, the University modified its segregation policy somewhat but the discriminatory effect remained. The University con-

tended that these restrictions were nominal, but the Supreme Court disagreed and held that the discriminatory restrictions denied McLaurin the substantial equality of right guaranteed by the Fourteenth Amendment.

Again the Supreme Court refused to reconsider *Plessy*. Chief Justice Vinson, speaking for a unanimous court, pointed out the possible adverse affects on the students whom petitioner would someday supervise and instruct because his training was unequal to that of his classmates. The fact that McLaurin might still be set apart by his fellow students after removal of the restrictions was regarded as irrelevant because there is "a vast difference - a constitutional difference - between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar" [p. 641]. Therefore, the court concluded that the restrictions imposed upon McLaurin set him apart from the other students, handicapped his graduate study, and impaired and inhibited his ability to engage in discussion and exchange views with other students, and in general, to learn his profession.

The constitutionality of segregated public education was a moribund issue after the *Sweatt* and *McLaurin* decisions. The court no longer looked to the customs and traditions of the people as it did in *Plessy* to determine the reasonableness of segregation. Instead, the court looked to the actual equality of the separate facilities and to the principle of the *McLaurin* case that segregation and discrimination in the use of identical facilities cannot be imposed for their own sake. Since the court emphasized equal facilities to the point of requiring identical facilities (*Sweatt*) and since the court proscribed differential treatment once the state opens its doors to both races (*McLaurin*), it appeared that there could no longer be a constitutional justification for segregated education on any level. And inasmuch as the court refused to overrule the "separate but equal" doctrine, it left open two general avenues with which to dispose of future public education segregation cases - by either looking at the physical facts and finding existing inequalities or by ultimately reversing the *Plessy* doctrine, as it would do in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Selected Bibliography

1. "The Fourteenth Amendment and Racial Segregation in State Supported Schools." Note 24 *Temple Law Quarterly* 222(1950).

The author discusses the *Plessy* decision and the court's reasoning thereto, the "separate but equal" doctrine as applied to public education from 1896-1949, and the doctrine as applied to public education in 1950. The author concludes that in light of *McLaurin* and *Sweatt* the degree of equality of facilities required by the Supreme Court make a segregated system impractical if not impossible. Further, the effect of those two cases should end segregation in education since true equality of separate facilities can never be met.

2. Note. 24 *Southern California Law Review* 74 (1950).

The author discusses the Fourteenth Amendment background of the cases involving the Fourteenth after the Civil War (e.g. *Slaughter-House*), the *Plessy* doctrine, and the legal and practical application of the doctrine in undergraduate, graduate and professional

schools. The author concludes that only an invalidation of all public school segregation will remedy the inequalities in education. The author believes that the Supreme Court cannot effectively operate as a "super school board" because even if it examines the facts of each case in the graduate schools, and insures equality there, it would still leave the state and federal lower courts free to determine the facts in the thousands of school districts at lower levels of public education. It is there where the vast majority of the people begin and end their formal education. Moreover, while some progress toward equality has been made, inferior education for blacks will continue as long as segregation continues, and as long as findings of equality are made by Southern courts.

3. "Implications of Recent Cases on Education of Minority Racial Groups," Note. 3 *University of Florida Law Review* 358 (1950).

The author briefly discusses the history of racial segregation in public schools and the Sweatt and McLaurin decisions. She quite correctly concludes that the two cases are "certain to affect major changes in education, particularly in colleges located in the South," and that the court wisely limited its decisions to the immediate cases and issues before it" due to the "social repercussions that would undoubtedly follow from any general

holding that no segregation in public schools is permissible."

4. "The Negro in the Supreme Court: Five Years More." Edward F. Waite, 35 *Minnesota Law Review* 625 (1951).

Waite, a federal district court judge, traces case developments involving racial discrimination against negroes in the areas of real estate and racially restrictive covenants, public carriers, employment, juries, voting rights, and state institutions of professional and higher education, discussing the Gaines, Sweatt and McLaurin decisions.

5. "Education, Segregation and the Supreme Court—A Political Analysis." John Roche, 99 *University of Pennsylvania Law Review* 949 (1951).

Roche examines the court's decisions in Sweatt and McLaurin and their effect on lower federal and state courts. He discusses some of the probable reasons why the court declined to overrule *Plessy*, the holdings of the cases, and possible future implications (e.g. "separate legal education cannot be equal"). He also presents four possible avenues of precedent open for a court in deciding a segregation case, and notes several subsequent cases that apply the Sweatt and McLaurin holdings. Roche concludes that the Supreme Court will have to make its position clear regarding its views.

CHAPTER TWO: A DREAM REALIZED

Thomas Black
Frank Aquila

Brown v. Board of Education of Topeka(I)

347 U.S. 483

(Argued Dec. 9, 1952; reargued Dec.
8, 1953; decided May 17, 1954)

Background: Four cases originating from Kansas, South Carolina, Virginia, and Delaware, each based on different facts and different local conditions, were consolidated in one opinion because each involved common legal questions.

The first case, from Kansas, *Brown v. Board of Education* 98 F. Supp. 797 (1951), involved black children of elementary school age who sought to enjoin the enforcement of a Kansas statute which permitted, but did not require, cities with a population of more than 15,000 to maintain separate school facilities for black and white students. The Topeka Board of Education opted to establish segregated elementary schools. The federal district court found that segregation in public education has a detrimental effect upon black children, but denied relief because the two separate schools were substantially equal, and because of past Supreme Court authority. Moreover, the district court held that segregation alone, absent substantial inequalities, is not per se unconstitutional. This case and the other two federal court cases bypassed the normal appellate route and came before the Supreme Court on direct appeal pursuant to a United States statute.

The South Carolina case, *Briggs v. Elliot*, 98 F. Supp. 529 (1951), involved both high school and elementary school age children who sought to enjoin the enforcement of state constitutional and statutory segregation provisions. The federal district court denied the injunction but found the black schools to be inferior to the white schools and ordered state officials to equalize the former. The Supreme Court vacated that judgment for the purpose of obtaining the district court's views concerning the progress made in the equalization program. 342 U.S. 350. On remand, the district court found that substantial equality had been achieved. 103 F. Supp. 920 (1952).

In the Virginia case, *Davis v. County School Board*, 103 F. Supp. 337 (1952), black high school age students sought to enjoin the enforcement of the state constitutional provision permitting public school desegregation. The district court upheld the segregation provisions and ordered the school board to equalize the separate school systems with due diligence.

In *Gebhart v. Belton*, 91 A.2d 137 (1952) the Delaware case, elementary and high school children sought to enjoin the enforcement of mandatory segregation provisions in the

Delaware Constitution and statutory code. The lower state court held that segregation results in an inferior education for black children, that the black schools were not substantially equal, and ordered the white schools to admit the black children. The Supreme Court of Delaware affirmed the lower court's ruling but the segregation provisions were not held invalid or unconstitutional. The state sought to overturn this decision in the Supreme Court.

In each of the federal cases, the school children sought to be admitted to state-supported public schools on a non-segregated basis, and in each case they were denied admittance. The basis on which the petitioners claimed relief was that they were denied equal protection of the laws under the Fourteenth Amendment. The "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and subsequent cases relying on *Plessy* were applied in each case. Although the black children were admitted to the white school in the *Gebhart* case it was only because there were substantial inequalities between the two schools. In essence, the *Gebhart* case also applied the fiction, but due to the situation in the Delaware School system, the separate public schools were not, in fact, equal.

Much data and statistical information was compiled and became a part of the record from which the Supreme Court could clearly determine the inequality of the separate schools. In each case counsel for the black children used the testimony of school officials and private citizens to draw startling contrasts between physical facilities, curricula, and quality of instruction. Moreover, in several cases per capita tax expenditures for white schools versus black schools showed a wide disparity. Comparisons of the number of pupils per schools, room and teacher, and physical facilities in terms of water fountains, restrooms, auditoriums and gymnasiums also clearly revealed gaping differences.

In addition to stressing the physical and intangible inequalities between the separate schools, testimony from social psychologists, educationalists and sociologists indicated that segregation itself is detrimental in that it produces harmful effects upon the emotional, physical and financial status of those segregated. (See the discussions in the Selected Bibliography section.)

Armed with the above-mentioned data and statistical evidence, the segregation cases were thoroughly argued

before the court in the 1951 term. A decision was not rendered. Reargument was set and heard in the 1954 term based on five questions propounded by the court.

The first question was whether Congress contemplated the abolition of public school segregation when the Fourteenth Amendment was framed, adopted and ratified. If there was no such contemplation, the second question was whether Congress could abolish public school segregation under the express power granted it under section five of the Fourteenth Amendment; or, in light of future conditions not contemplated by the framers in 1865, whether the judiciary could construe the amendment as abolishing educational segregation. If neither alternative could eliminate segregation in public schools, the third question considered whether it was within the judiciary's power to abolish it anyway. The relevancy of these three questions was apparent and pivotal since the proponents of segregation in public schools strongly argued that such segregation was common and accepted at the time of the amendment's adoption, so there could have been no intention on the part of the framers to interfere with this social practice (see the Bickel article for an excellent analysis of the congressional intent in adopting the Fourteenth Amendment and the Supreme Court's application of that intent (or lack of) to the present cases). The last two questions dealt with the method of enforcement in the event that the court should find segregated education a denial of equal protection.

Court Ruling: After stating the facts and the legal issues involved in the segregation cases, a unanimous court, speaking through Chief Justice Earl Warren, addressed the circumstances surrounding the adoption of the Fourteenth Amendment. Much historical evidence and research was presented to the court on reargument, but the opinion disposes of these materials quite summarily by stating "... although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive" (at p. 489). The evidence was inconclusive since the understanding of the Congress, the states and the framers could not be authoritatively determined, because of the status of public education at the time the amendment was adopted.

In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent, and practically all of the race was illiterate. In fact, any education of Negroes was forbidden by law in some states (at pp. 489-90).

As a consequence of the very rudimentary stage of public education at that time, it was no surprise to the Court that there was so "little in the history of the Fourteenth Amendment relating to its intended effect on public education" (at p. 490).

Therefore, as the Supreme Court viewed the problem, the question before it was not what the understanding was in regard to segregation in 1868 when the amendment was ratified, or even in 1896 when *Plessy v. Ferguson* was written. Instead, "We must consider public education in light of

its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." (at pp. 492-93).

Viewed in this context, the court proceeded to its conclusion. Emphasizing that education is today perhaps the most important function of state and local governments, that compulsory education laws demonstrate society's recognition of the importance of education to a democratic people, that education is the very foundation of good citizenship and that in today's modern age it is doubtful that any child may reasonably expect to succeed in life if s/he is denied the opportunity of an education, the court concluded that such an opportunity, where the state undertakes to provide it, is a right which must be available to all on equal terms. Segregation of children in public schools based solely on race, even though the physical facilities and other "intangible" factors may be equal, deprives the minority children of equal educational opportunities.

In holding that racial segregation in public schools violates equal protection of the laws, the court relied on the professional education segregation cases of *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). The court stressed the importance of the "qualities which are incapable of measurement" in comparing the educational advantages afforded by segregated schools. These intangible considerations "apply with equal force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Reference was also made to the finding by the federal district court in the Kansas case (*Brown*):

The impact (of segregation) is greater when it has the sanction of the law. For the policy of separating the races is usually interpreted as denoting inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.

The court stated that whatever might have been the extent of "psychological knowledge" at the time of *Plessy v. Ferguson*, this finding as to the retarding educational effect of enforced segregation was amply supported by modern authority and that only the language in *Plessy* contrary to this finding is rejected.

The court concluded by stating that in the field of public education the doctrine of "separate but equal" has no place. The crux of the opinion was stated in a single sentence of dramatic force: "Separate educational facilities are inherently unequal" (p. 495). The segregation cases were then restored to the docket in order for the court to hear further argument on the issue of enforcement—questions four and five.

In a companion case to the four state segregation cases the court dealt with segregation in the public schools of the District of Columbia. Here, the Supreme Court reached the same conclusion, but via a different route. The Fourteenth Amendment is not applicable to the District of Columbia because it is not a state. But the District, as a subdivision of the federal government, is subject to the limitations imposed by the due process clause of the Fifth Amendment. Referring to prior decisions, the court stated that the liberty secured by due process could not be restricted except for a proper governmental objective. The court, therefore, held that "segregation in public education is not reasonably related to any proper governmental objective, since this imposes on Negro children . . . a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process clause" (p. 500).

The decision in *Brown* applies only to segregation in state supported schools, and does not require the states to establish school districts in such a way as to ensure racial integration. In certain areas a normal program of districting for school purposes will have the effect of a segregation program. Nothing in *Brown* can be interpreted to interfere with the establishment of school districts along geographical lines. The court recognized these ministerial problems when it decided to hear further argument on the relief and remedies to be proscribed in implementing the court's decision.

Selected Law Review Articles

1. "The Desegregation Cases: Criticism of the Social Scientists Role," Kenneth B. Clark, 5 *Villanova L. Rev.* 224 (1959).

Clark discusses specific fundamental criticisms of the social scientist's role as well as the authors in the segregation cases. Criticism from southern states and senators charge that the decision in *Brown* violates states' rights and that there is an attempt to substitute psychological and sociological theories for the law. The author believes such criticisms are motivated by political considerations.

Clark refers to criticisms leveled at him by Professor Cahn of New York University Law School [see "Jurisprudence," 30 *N.Y.U.L. Rev.* 150 (1955)] and Ernest van den Haag, a doctor in the social science field. [See also K. B. Clark, *The Social Scientist, the Brown Decision, and Contemporary Confusion*, where the author argues his position and replies to critics. See also: Van den Haag, "Social Science Testimony in Desegregation Cases—A reply to Professor Kenneth Clark," 6 *Villanova L. Rev.* 69 (1960), and Pittman, "The Blessings of Liberty v. The Blight of Equality" 42 *N.C.L. Rev.* 86 (1963) and Gregor, "The Law, Social Science, and School Segregation: An Assessment," 14 *W. Res. L. Rev.* 621 (1963)].

2. "The Chief Justice, Racial Segregation and the Friendly Critics," Ira Michael Heyman, 49 *California Law Review* 104 (1961).

Heyman discusses, analyzes, and refutes criticism leveled by two renowned scholars of the *Brown* deci-

sion. Both the scholars abhor segregation and their criticism is directed at the theoretical and legal underpinnings of the decision. Professor Herbert Wechsler asserts that there is no legal basis for the court to stamp out segregation [See Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harvard L. Rev.* 1 (1959)]; and Professor Louis Pollak, who also agrees with the court's action, believes that the opinion of the chief justice was intellectually insufficient and asserts that the court's decision was based on the ground that segregation "harms" blacks by making them feel inferior. [See Pollak, "Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler," 108 *V. Pa. L. Rev.* 1 (1959) and Pollak, "The Supreme Court Under Fire," 6 *J. Pub. L.* 428 (1957)]. Both critics are dissatisfied with that interpretation and interpret the opinion as making "harm" the sole basis of the unconstitutionality of public school segregation. Heyman believes that the criticisms are unjustified. He asserts that *Brown*, when properly read, establishes the proposition that the Fourteenth Amendment invalidates laws employing racial classifications in the field of public education whether or not blacks are made to feel inferior.

3. "The Original Understanding and the Segregation Decision," Alexander M. Bickel, 69 *Harvard Law Review* 1 (1955).

Bickel reviews, analyzes and discusses the congressional record of the debates and hearings surrounding the framing and adoption of the Fourteenth Amendment in order to ascertain the intent of the framers, with regard to segregation.

He concludes that it is clear that the Fourteenth Amendment was not expected to apply to segregation in 1866. He also believes that the inquiry into the Congressional understanding in 1866 should not stop at the immediate impact of the enactment on conditions then present. Another inquiry should be made into the Congressional intent of the long-range effect under future circumstances. The Supreme Court in the segregation cases recognized this second inquiry in question two of the five propounded in the 1952 term. Because of the general language used in Section 1 of the amendment, it appears that it is to apply to all state discrimination whether based on race or not. Bickel believes the adopters had this in mind and it was their intent to subject the amendment to a "Latitudinarian" construction. It was also their belief, according to the author, that the construction and interpretation of the amendment was to come from Congress under its powers under Section 5.

The language of the Fourteenth Amendment was a compromise between several competing groups. The language had both the "sweep and appearance" of a careful enumeration of rights, and it had a "ring to assuage the prejudices of the people." The author believes that there was an "awareness on the part of (the framers) that it was a constitution they were writing, which led to a choice of language capable of growth."

The author concludes that "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866."

4. "Segregation and its Impact on Educational and Psychological Development," Edmond Cahn.

It is difficult to state that the critical element in the segregation cases was the court's endorsement of the finding that state-imposed segregation "has a tendency to retard the educational and mental development of Negro children." The reliance on social science evidence—and the quality of those data; then and now—have been criticized.

Professor Edmond Cahn, distinguished professor of jurisprudence at New York University of Law School, believes that it is incorrect to think that the *Brown* decision was "caused by the testimony and opinions of the scientists." Cahn also comments that "I would not have the constitutional rights of Negroes—or of other Americans—rest of any such flimsy foundation as some of the scientific demonstrations in these records. . . . (Behavioral science finding's) have an uncertain expectancy of life." [see "Jurisprudence," 30 N.Y.U.L. Rev. 150 (1955)].

There has also been disagreement in the court's decision when it stated that segregation "generates a feeling of inferiority." The disagreement stems from the basis of such a conclusion—whether the critical elements in establishing the conclusion comes from social science data, judicial notice, history, the stereotypical assumption of black inferiority, which provided the underpinnings for the general system of segregation or the black communities perception of the stigma imposed by segregation. Professor Cahn emphasized "the most familiar and universally accepted standards of right and wrong" as demonstrating that "racial segregation under government auspices inevitably inflicts humiliation," and that "official humiliation of innocent lawabiding citizens is psychologically injurious and morally evil." However, as common-sensical as this may sound, it is doubtful that the court can properly rest a decision on "universal" moral standards without added support from empirical data or history.

5. "The Lawfulness of the Segregation Decision," C.L. Black, Jr., 69 Yale L. J 421 (1960).

Professor Black defends the "lawfulness" of *Brown* by emphasizing that the southern cultural tradition during the period of enforced segregation makes it clear that "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law." Moreover, "If a whole race or people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated 'equally,' I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter." Black felt that the segregation system clearly fit that description. He added; "Segregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory. . . . The purpose and impact of segregation in the Southern regional culture," he noted, were "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world." At the time of *Brown*, Southern segregation was not "mutual separation of whites and Negroes," but rather "one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own."

6. "Toward Neutral Principles of Constitutional Law," Herbert Weschler, 73 Harvard L. Rev 1 (1959).

Professor Herbert Weschler argues:

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.

He asked:

Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?

7. "Racial Discrimination and Judicial Integrity: A Reply to Professor Weschler," Pollak, 108 J. Pa. L. Rev. 1 (1959).

In reply to Weschler's article, Pollak writes:

We start from the base point that in the United States "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect." *Korematsu v. United States*, 323 U.S. 214 (1944). Certainly legislation passed in such terms is not entitled to the ordinary presumptions of validity. On the contrary there is special need for "a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities." We could not, therefore, sustain the reasonableness of these racial distinctions and the absence of harm said to flow from them, unless we were prepared to say that no factual case can be made the other way. . . . To the extent that implementation of this decision forces racial mingling on school children against their will, or against the will of their parents, this consequence follows because the community through its political processes has chosen and may continue to choose compulsory education—just as, from time to time, the nation has, through federal legislation, adopted the principle of coerced association implicit in a draft army. In neither instance can the coercion be said to emanate from (the Supreme Court) or from the Constitution. In any event, parents sufficiently disturbed at the prospect of having their children educated in democratic fashion in company with their peers are presumably entitled to fulfill their educational responsibilities in other ways.

8. "The Effects of Segregation and the Consequences of Desegregation," Appellant's Brief, 37 Minn. L. Rev. 427 (1953).

At trial in several of the segregation cases, psychologists, psychiatrists, and social scientists testified as to the harmful effects of state-imposed segregation on Negro school children. On appeal, appellants filed, as an appendix to their brief, a statement to this effect drafted by 32 sociologists, anthropologists, and psychiatrists who worked in the area of American race relations.

9. "Book Review," Honnold, 33 *Ird. L. J.* 612 (1959).

Honnold writes: The essential issue is one of fact—whether segregation involves special harm for Negroes and therefore violates the constitutional standard of equality. But the basic factual issue cannot be relitigated in each case which involves the question. Rather, the factual question seems to be merely a phase in the Court's development of constitutional wisdom. The relevance of the issues on which the social scientists wrote and testified is inescapable (and) leads to a general constitutional ruling which will govern subsequent cases until the basic factual assumptions can be shown to be wrong. And there must be opportunity for such further proof. For example, representatives of Southern states . . . should have the opportunity to marshal evidence—including testimony by social scientists—in support of the proposition that a system of segregation does not handicap the Negro. If such a showing were made, the current constitutional rule . . . would have to be modified.

10. "De Facto School Segregation: A Constitutional and Empirical Analysis," Goodman, 60 *California L. Rev.* 275 (1972).

. . . The social science writings and testimony offered in support of the psychological findings of harm in *Brown* had little probative force. The main theme of that evidence was that Negro children, from a very young age, are sensitive to and strongly affected by prejudice and discrimination generally. None of the empirical studies brought to the Court's attention, either in oral testimony or in the plaintiff's Brandeis brief [see 37 *Mina L. Rev.* 427 (or reprinted copy)], even purported to isolate the effects of public school segregation per se; the only item even remotely addressed to that question was an article reporting the undocumented opinions of social scientists in response to a nationwide poll. [Specifically, Duetschen and Chien. The "Psychological effects of Enforced Segregation: A Survey of Social Science Opinion," 26 *J. Psych* 259 (1948).]

It is not surprising, therefore, that constitutional scholars, whatever their views as to the correctness of the decision, have been reluctant to believe that the court relied to any great extent on the "modern authorities" cited in its opinion." (See e.g. the Wechsler, Cahn and Black articles cited throughout the text).

Goodman proceeds to propound three alternate theories as to why the court made findings of "harm" when there was no solid empirical evidence. One theory was that the psychological harm was self-evident and therefore subject to judicial notice. This view was taken by Professors Cahn and Black. (See their comments in the text). The second theory advanced by Goodman was that "harm" findings were nonessential and superfluous to the result because *Brown* can be interpreted as an equal protection case forbidding the state's use of race as a basis for excluding persons from particular public facilities. The "harm" findings were used merely as a buttressing argument. [See "The Chief Justice, Racial Segregation and the Friendly Critics," Ira Michael Heyman, 49 *California Law Review* 104 (1961)]. Lastly, the harm was presumed and not disproven. Under this view the states had the burden of proving no harm. The presumption of constitutionality is reversed in the case of racially discriminatory legislation. (See the Pollak passage in this text). It is those asserting the constitutional violation who are entitled to the benefit of factual doubt and they need merely show that the possibility of harm cannot be ruled out. Goodman continues: "With the issue in that posture, the Court in *Brown* was wholly justified in accepting the sociological evidence with an uncritical eye. If 90 percent of the experts polled held the opinion, however unsupported, that enforced segregation had detrimental psychological effects on the Negro child, how could the Court exclude the possibility?" While each of these three theories rationalize the finding of "harm" in *Brown* as to segregation by law (*de jure*), they are less pertinent to the issue of segregation which arises in the context of a state policy (*de facto*).

Brown v. Board of Education (II)

349 U.S. 294 (1955)

Background: *Brown II* implemented the Supreme Court's decision on *Brown I*, which held that racial segregation by the state in its public school facilities was a denial of the equal protection prohibited by the Fourteenth Amendment.

Whether *Brown I* is viewed as prohibiting segregation because it is an impermissible racial classification, or because it does educational damage to blacks, or because of the inherent inequality of segregated education, or because of any combination of these factors—the causes of segregation would appear to be immaterial. Whether a state requires segregation by law, or merely accepts it, the same invalid classification, the injury, or inequality takes place.

In *Brown II*, the Supreme Court reversed the lower courts, judgements (except in *Gebhart v. Belton*) and remanded to

the lower courts to take such proceedings and enter such orders and decrees consistent with the two *Brown* opinions.

Court Ruling: The court began by reaffirming the principle in *Brown*, that racial discrimination in public education is unconstitutional, and stated that "all provisions of federal, state or local law requiring or permitting such discrimination must yield" to the decisions in the two *Brown* cases. (at p. 298).

Because of the "complexities arising from the transition to a system of public education freed of racial discrimination," the court heard further argument. The states which required or permitted educational segregation were given the opportunity to present their views and solutions on the implementation of *Brown*.

The decree implementing the *Brown* principle instructed the lower courts that the local school boards should retain primary responsibility for "elucidating, assessing and solving" the varied local school problems of the period of transition. In framing their mandates the lower courts are to "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles" (p. 299).

Though "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them" (at p. 300), the public interest in overcoming a variety of obstacles in making the transition may permit delay in granting a remedy. Here, as a court of equity, the Supreme Court is balancing the interests of the opposing groups in its attempt to formulate a workable remedy that will affect a large number of people. Such a delay in effecting a remedy is a valid exercise of equitable powers and has been applied in other Supreme Court decisions. The court is "shopping for" the available relief and "adjusting and reconciling public and private needs" by not requiring immediate desegregation. (at p. 300).

However, in every case, the local school boards are required to make "a prompt and reasonable start" toward compliance with *Brown*. Once a start has been made, additional time may be granted "to carry out the ruling in an effective manner." Once the "prompt and reasonable start" has been made, the state official or school boards must show that additional time is necessary, that it is in the public interest, and that it is "consistent with good faith compliance at the earliest practicable date." (at p. 300). In determining how much delay should be granted the courts should consider problems related to "administration, arising from the physical condition of the school plant, the

school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the problems (at p. 300-1).

During the period of transition, the courts are to retain jurisdiction of the cases and are to "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases" (at p. 301). The Supreme Court's decision in *Brown II* can be summed up as follows: (1) The local school boards are required to implement *Brown* in good faith; i.e., they are required to do everything reasonable in eliminating public school segregation. (2) The lower courts, because of their proximity to local conditions and possible need for further hearings, will retain jurisdiction of the cases in order to see that *Brown* is carried out. The lower courts are to consider administrative obstacles in implementation and the competing interests involved. (3) The school boards must make this good faith implementation promptly and reasonably. (4) After the start toward desegregation is made, additional time may be granted to effect desegregation if the defendants (school boards) prove that the additional time is necessary, is in the public interest, and is consistent with its good faith compliance or beginning. Community hostility will not be grounds for an additional delay in desegregating the school system because it is not consistent with good faith compliance. (5) The standards of "with all deliberate speed" and "a prompt and reasonable start" serve as guiding principles in any desegregation plan that could potentially override a recalcitrant school board.

CHAPTER THREE: WITH ALL DELIBERATE SPEED

Patrick Tydings
Robert Potters
Thomas Black
Frank Aquila

Cooper v. Aaron
358 U.S. 1 (1958)

Background: The Supreme Court met in an unusual special term to consider the Little Rock (Arkansas) School Board's request for a stay or postponement of its plan of integration. Three days after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Little Rock Board of Education publicly announced that it intended to comply with the constitutional requirements and that it would proceed to develop a plan for eliminating the racial restrictions upon attendance in the Little Rock schools. In May of the following year, seven days before the second *Brown* opinion, *Brown v. Board of Education*, 349 U.S. 294 (1955), the school board approved and published its plan for the elimination of racial segregation in the schools. The action taken by the school board was voluntary and local, with the federal government taking no part in the adoption of the plan. The plan called for desegregation at the senior level of high school first, followed by desegregation of the junior high and elementary levels. The plan was to commence in 1957 with complete desegregation by 1963.

The plan was approved by a federal district court, 143 F. Supp. 855, and withstood a challenge that the plan was too gradual and too deliberate. The court of appeals affirmed the plan. 243 F. 2d, 361.

While the school board continued with its desegregation program, the Arkansas General Assembly passed an amendment to the state constitution opposing the desegregation decisions. Further statutory action made it clear that Arkansas did not consider itself bound by the principle set forth in *Brown*.

On September 2, 1957, as integration was about to commence by the admission of ten black students to the Little Rock Central High School, the governor dispatched units of the state national guard to the school. The governor placed the high school "off limits" to black students and had the troops block the entrance to prevent the students from entering. Such action provoked widespread public hostility and opposition to the desegregation plan.

On September 20, a federal district court enjoined the governor and officers of the state national guard from further interference with the implementation of the plan. 156 F. Supp. 220, affirmed 254 F. 2d 797. The state troops were withdrawn, but due to continued opposition and riotous demonstrations against integration President Eisenhower, on September 25, sent federal troops to the high school to

effectuate the admission and unfettered education of the black students. Thereafter, some form of federal militia was assigned in and around the high school throughout the balance of the school year. However, the resistance and public hostility sanctioned by the governor and legislature's actions remained. Finding it difficult to sustain the effectiveness of education vis-a-vis the desegregation program, the school board, in February 1958, brought the present action seeking a two-and-one-half-year postponement of the plan and requested the withdrawal of the black students to segregated schools.

Noting the tension, unrest and turmoil prevalent in the school and community and finding the situation "intolerable" the federal district court, in June 1958, granted the relief sought. 163 F. Supp. 13. In August, the court of appeals reversed the granting of the postponement after convening a special session. 257 F. 2d 33.

Recognizing the vital importance of a decision of the issues in time to allow arrangements to be made for the 1958-59 school year, the Supreme Court convened in special term on August 28 and heard oral argument.

On September 12, in a unanimous per curiam decision, the court affirmed the judgement of the court of appeals. On September 29, a full opinion, signed by all of the justices, was announced reaffirming the *Brown* principle.

Probably no decision in the history of the Supreme Court has directly concerned so many individuals as has the *Brown* decision. At the time of the decision in 1954, segregation in the schools was required by law in seventeen states and the District of Columbia. There were over 8,000,000 white and 2,500,000 black school children enrolled in approximately 35,000 white schools and 15,000 black schools. But in practical operation, racial segregation had not been confined to the southern states. De facto segregation in public schools in northern and border states often resulted from school districting along geographical lines and from the inability of blacks to secure housing in white neighborhoods.

An important question arising from the *Brown II* decree was how much delay should be permitted in the implementation of nonracial public schools? Since the *Brown II* decree was based upon factors cognizable only in equity, it would appear that there would be no denial of equal pro-

tection until the delay had become, under all the circumstances, unreasonable.

Delay in implementation of desegregation programs was the result of many factors—some legitimate, others in purposeful countervention of *Brown*. Generally, suits are brought, pursuant to *Brown*, by a black plaintiff on behalf of himself or of a class of all similarly situated blacks within an administrative area, i.e. a class action suit. After *Brown*, several recalcitrant states attempted to delay the enforcement and implementation by procedural devices. Statutes were enacted requiring elaborate administrative appeals from decisions of local school boards affecting pupil assignments. Moreover, the statutes required that remedies for desegregation be pursued by individual plaintiffs and not by representation of a class. This meant that black students wishing to enroll in white schools for desegregation purposes would be statutorily required to bring individual suits and not one class action suit which determined the rights and remedies of all. This type of procedural ploy had the potential for long, time-and-money consuming delays. Those statutes were clearly unconstitutional but served to protract the implementation process.

Often, local officials refused outright to co-operate in formulating any kind of desegregation plan. Since *Brown II* made delay a matter of equity discretion and placed on the defendant school board the responsibility for administering desegregation and the burden of showing the need for delay, the local court had no means of formulating a plan of its own. Several courts countered this inaction by issuing affirmative orders to compel the presentation of a plan.

The formulation of desegregation plans by local school boards was also a cause of delay. There was diversity among the lower courts regarding the weight to be given to the administrative factors enumerated in *Brown II*. Much of the diversity was engendered by the response of the courts and school boards to the factor of community hostility. This factor was not expressly considered by the court in *Brown II* beyond the statement that "disagreement" alone cannot prevent ultimate enforcement. Some courts found that *Brown II* foreclosed consideration of actual or potential local hostility in determining the need for delay, and only those administrative elements specifically enumerated may be weighed or considered. Other courts placed direct reliance on the hostile community attitudes to justify delay, e.g. *Aaron v. Cooper*, 163 F. Supp. 13. In a forceful opinion the Supreme Court, in *Cooper v. Aaron*, addressed the issue of public hostility and its effect on the *Brown* principle.

Court Rulings: In its opinion, unprecedented in that it was signed by all nine justices, including three new justices appointed after *Brown*, the court first reaffirmed *Brown*'s holding "that the Fourteenth Amendment forbids states to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds, or property" (p. 4).

The court then accepted the lower district court's findings of the chaotic, tense and violent conditions that had existed at Central High School during the 1957-58 school year. Moreover the court accepted the findings that "military assistance or its equivalent" would continue to be needed and that "the educational progress of all students

... will continue to suffer if the conditions which prevailed last year are permitted to continue." (at p. 15). In addition, the court also accepted "without reservation" the position of the Little Rock School Board and superintendent of schools that they exhibited "good faith" in their conduct in the proceedings leading up to the suit. However, the court denied the school board's request for a postponement stating that the difficult conditions that existed at Little Rock were

directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case. . . . The constitutional rights of (the black school children) are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the governor and legislature! [pp. 15-16].

The court made it clear that the promotion of public peace by the prevention of race riots was desirable, but this aim can not be accomplished by depriving children of their constitutional rights. The difficulties, created by state action, "can also be brought under control by state action!" [at p. 16].

The court discussed the Fourteenth Amendment and state action stating that "the prohibition of the Fourteenth Amendment extends to all action of the State denying equal protection of the laws; whatever the Agency of the State taking the Action" [at p. 17]. The decision in *Brown* "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation." [at p. 17].

The court discussed the charge by the Arkansas governor and legislature that they were not bound by the holding in *Brown*. In dictum having little bearing on the case at hand, the court stated

It is necessary only to recall some basic constitutional propositions which are settled doctrine. Article VI of the Constitution makes the constitution the 'Supreme Law of the Land'. In 1803, Chief Justice Marshall, speaking for a unanimous court, referring to the constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, Tranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this court in the *Brown* case is the supreme law of the land, and Article VI of the constitution makes it of binding effect on the States 'anything in the constitution or laws of any state to the contrary notwithstanding! Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Article VI Paragraph 3, 'To support this constitution.' (at pp. 17-19).

Goss v. Board of Education,
186 F. Supp. 559 (1960)

Background: This suit was filed by black children and their parents and guardians against members of the Knoxville, Tennessee Board of Education. They sought an injunction to restrain defendants from operating a compulsory racially segregated school system and a declaratory judgment, declaring the rights of the plaintiff school children to be admitted to Knoxville public schools on a racially unsegregated basis and without discrimination on account of race or color.

The board admitted that the public schools were operated on a separate basis but averred that two conflicting duties faced them. One was to obey the Constitution of the United States as it had been interpreted in matters of segregation and the other was to honor and respect an allegiance to the Knoxville community to protect their cherished institutions. The board further stated that "the interest of the community demanded postponement of desegregation until a plan could be perfected that would fit the needs of the community." (at p. 560).

The facts indicate that, although the board made a resolution on August 17, 1955 to act in good faith to implement the Constitutional principles declared in the *Brown* decision, it was not until April 8, 1960 that a plan was filed. (The board stated that several previous plans had been postponed for three reasons: (1) desegregation should not be attempted until the school building program was further advanced; (2) a belief by board members that the two races were not ready for a definite plan for desegregation; and (3) that further delay would lessen the likelihood of unpleasant incidents.)

Plaintiffs filed several objections to the plan. They were as follows: (1) The plan did not provide for elimination of racial segregation "with all deliberate speed" as required by *Brown II*. (2) It did not take into account the five years which had elapsed during which the board had failed and refused to comply with the equal protection clause of the Fourteenth Amendment. (3) A period of twelve years for the consummation of the plan was not in the public interest and was not in compliance with the "all deliberate speed" of *Brown II*. (4) The board had not carried the burden of proof of showing problems related to public school administration as specified by *Brown II*. (5) Under the plan, the plaintiffs and all other children attending the public schools of Knoxville were deprived of their right to attend a desegregated school as granted to them by the *Brown* decision, 1954. (6) The plan deprived plaintiffs and those similarly situated from enrolling in Fulton Technical High School, other special vocational schools, summer courses, and kindred educational training of a specialized nature for which enrollment was not based upon residence. (7) Paragraph 6 of the plan violated the due process clause of the Fourteenth Amendment in that said paragraph provided racial factors as conditions to support requests for transfer, and was implemented, further studies made on desegregation, as well as plans developed that would prevent radical changes in the classroom.

The plan submitted was referred to as Plan Nine. Its contents were as follows: (1) Effective with the beginning of the 1960-61 school year racial segregation in grade one of the Knoxville Public Schools was to be discontinued. (2) Effective for the 1961-62 school year racial segregation would be discontinued in grade two and thereafter in the next higher grade at the beginning of each successive school year until the desegregation plan was effected in all twelve grades. (3) Each student entering a desegregated grade in the Knoxville Public Schools would be permitted to attend the school designated for the zone in which he or she legally resides, subject to modifications that may be necessary in particular instances. (4) A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race would be established for the administration of the first grade and other grades as hereafter desegregated. (5) Requests for transfer of students in desegregated grades from the school of their zone to another school would be given full consideration and would be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration. (6) The following would be regarded as some of the valid conditions to support requests for transfer: (a) when a white student would otherwise be required to attend a school previously serving colored students only; (b) when a colored student would otherwise be required to attend a school previously serving white students only; (c) when a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race.

The racial factors are designed and necessarily operate to perpetuate racial segregation (p. 563).

Court Ruling: The issue, as the court saw it, was whether the time delay provided for in the grade-a-year desegregation plan was reasonably necessary in the public interest and whether it was consistent with good faith compliance at the earliest practicable date.

The court stated its concern for incidents of unrest and violence which attended the desegregation of schools in nearby communities. The court particularly mentioned evidence produced by defendants of threats of violence being made if desegregation was begun. Therefore, the court found that Plan Nine seemed to offer more safety and more assurance for an orderly progression toward a fuller unified school district. The district court further found that the board was delayed by circumstances over which it had no control and, therefore, their actions did comply with the requirements of the *Brown* decision. Plan Nine was accepted with one exception, which was an order directing defendant to present a plan within a reasonable time to allow black students to attend the technical schools.

Goss v. Board of Education,
301 F.2d 164 (1962)

Background: Appellants, plaintiffs in the lower court, brought suit against the Knoxville, Tennessee school board, appellees and defendants in the lower court. The plaintiffs sought orders to restrain the board from refusing to admit black pupils to certain designated "white" schools on account of race or color; for an order declaring the custom, policy, practice or usage of excluding plaintiffs and other persons similarly from any schools of the city of Knoxville solely because of race, pursuant to certain constitutional and statutory provisions of the Constitution of the State of Tennessee, to be unconstitutional and void; for a permanent injunction restraining the board from operating their schools on a biracial basis; and an order requiring to present to the court a plan designed to bring about good faith compliance with the decision of the Supreme Court of the United States in *Brown v. Board of Education*, 347 U.S. 483, at the earliest practicable date throughout the public school system of the city of Knoxville.

The board admitted that the public school system of Knoxville has been operated on the basis of separate schools for black and white pupils; that this plan was in accordance with constitutional and statutory provisions of the State of Tennessee; and that to their belief, they could not change the system without the compulsion of law. Defendants further stated that the black schools were excellent and that no discrimination existed in the type of education they received; that although white teachers taught in white schools and black teachers taught in the black schools all were paid on the same basis; that they had studied plans of integration since the *Brown* decision but that delay was "well advised"; and that they "owe no apologies to anyone, and make none" (at p. 166).

The board was ordered by the trial court to submit a plan of integration. Plaintiffs appealed on the issue of whether the plan, as submitted, was adequate to comply with the decisions of the United States Supreme Court. The plan of integration provided for school zoning based on location and capacity of school buildings and admission to schools by reason of residence in a zone without preference to races; discontinuance of racial segregation in steps of one grade a year, beginning with the first grade, effective with the school year, beginning 1960-61, and a system of transfers in which the following will be recognized as some of the valid conditions for transfer: (1) when a white student would

otherwise be required to attend a school previously serving black students only; (2) when a black student would otherwise be required to attend a school previously serving white students only; (3) when a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race (at p. 166).

Plaintiffs objected for the following reasons: "... that, considering the five years already elapsed since the *Brown* decision, twelve years was too long a period to accomplish complete desegregation; that the board had not shown that the delay was necessitated by any administrative problems enumerated by the court in the *Brown* decision; that it deprived black students of an opportunity for education in certain vocational schools and summer courses, and that the transfer plan would operate to perpetuate segregation of the races in the public school system" (at p. 166).

The trial court denied injunctive relief to the plaintiffs and approved the plan as submitted. However, the court did order the defendants to present a better plan for desegregating the technical and vocational courses.

The appellate court felt that the twelve-year plan of desegregation, which was adopted at a late date, did not meet either the spirit or specific requirements of the decisions of the Supreme Court. The court stated that the transfer provisions of the plan were not inherently illegal or unconstitutional, but that the use and application of it may become a violation of constitutional rights. The court noted that the transfer provisions function only upon request and rests with the students or their parents and not with the board. Furthermore, since the trial judge retains jurisdiction in the matter during the transition period, the provisions would be safely left in his hands.

In summary, the appellate court affirmed the trial court's judgment but modified that part which approved the school board's plan for continued segregation of all grades not reached by its grade-a-year plan. The court stated that more grades than contemplated by the board's plan should now be desegregated. Therefore the court remanded the case back to the district court with an order requiring the board to promptly submit an amended and realistic plan for the acceleration of desegregation, in keeping with the mandate of the Supreme Court for "good faith compliance at the earliest practicable date" (at p. 169).

Goss v. Board of Education,
373 U.S. 683 (1963)

Background: The appellate court in *Goss v. Board of Education* adjudicated an issue which involved certain parallel provisions of two transfer plans of two public school systems. The two school systems were Knoxville, Tennessee and an adjacent county, Davidson County. Both school systems, pursuant to court orders to desegregate had incorporated similar transfer provisions into their respective formal

desegregation plans. The transfer provisions allowed a student, upon request, solely on the basis of his own race and the racial composition of the school to which he had been assigned by virtue of rezoning, to transfer from such school, where he would be in the racial minority, back to his former segregated school where his race would be in the majority.

After the respective plans were approved by the district

court and the court of appeals, the United States Supreme Court granted certiorari on the question of whether the black school children seeking desegregation of the public school systems of Knoxville, Tennessee and Davidson County, Tennessee, were deprived of rights under the Fourteenth Amendment. Petitioners claimed that the transfer provisions were invalid because they were based solely on race and tended to perpetuate the pre-existing racially segregated school system.

Court Ruling: The Supreme Court found that, while transfers were available to those who choose to attend school where their race was in the majority, there was no provision whereby a student might transfer upon request to a school in which his race was in a minority, unless he qualified for a "good cause" transfer. The effect was to permit a child (or his parents) to choose segregation outside his zone but not to choose integration outside his zone. Applying the principle laid down in *Brown v. Board of Education*, the court that classifications based on race for purposes of transfers between public schools violate the Equal Protection Clause of the Fourteenth Amendment.

The court noted that a different case would result if the transfer provisions were unrestricted and allowed transfers to or from any school regardless of the race of the majority therein. The court stated that no official transfer plan or provision of which racial segregation was the inevitable consequence may stand under the Fourteenth Amendment.

The court reversed and directed the appellate court to remand to the district court for further proceedings not inconsistent with this opinion.

Maxwell v. Board of Education,
301 F.2d 828 (1962)

Background: In the lower court, plaintiffs brought a class action suit against the School Board of Davidson County, Tennessee to desegregate the county schools. The district court denied to plaintiffs an order for admission to certain schools designated as "white" schools.

The board admitted that plaintiffs lived nearer to schools to which admission was sought than to the designated black schools to which they were required to attend; that plaintiffs were denied admission to these schools by reason of their race or color; and that if they had been white children their requests would have been granted.

The district court refused to approve a plan submitted by the board which provided for a step-by-step, grade-a-year plan of desegregation. The court modified the plan so as to require four grades to be desegregated as of January 1, 1961. This modification caused the schools in Davidson County to operate on a parallel basis with those of Nashville, Tennessee. A part of the plan approved included a transfer provision similar to that of the Nashville Plan. The conditions for the transfer provisions were as follows: (1) when a white student would otherwise be required to attend a school previously serving black students only, (2) when a black student would otherwise be required to attend a school previously serving white students only, (3) when a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race at (p. 82).

Issues on appeal were whether the constitutional rights of some of the named plaintiffs were being violated in denying the privilege of immediate transfer to schools nearer to their homes than the ones they were required to attend on the basis of their race; and whether the transfer feature of the plan violated the Fourteenth Amendment to the Constitution because the plan provided for transfers to be made solely on the basis of race or color.

Court Ruling: The appeals court cited *Goss v. Board of Education*, 301 F. 2d 164 (1962), and stated that some individual rights would have to be subordinated for the good of many and that allowing suits by individuals seeking admission to grades not yet reached in the plan would thwart the smooth working of the desegregation plan at (p. 829). The court also stated that the transfer plans were not inherently unconstitutional so long as their use was not of an unconstitutional nature, such as the perpetuation of segregation. The judgment of the district court was affirmed.

Bradley v. School Board of Richmond
382 U.S. 103 (1965)

Background: The United States Supreme Court granted certiorari for this case and a companion case, *Gilliam v. School Board of Hopewell*, 345 F. 2d 325 (1965), on the issue of whether it is proper to approve school desegregation plans without considering, at a full evidentiary hearing, the impact on those plans of faculty allocation on an alleged racial basis.

The petitioners had standing to, and did, raise this issue in the lower court, but the court of appeals declined to decide the merits of the issue because no evidentiary hearing had been held. Neither did the appeals court remand the issue for hearing before finally approving the plans submitted by the Richmond and Hopewell School Boards.

Court Ruling: The Supreme Court held that the appeals court erred in this regard and that the petitioners should have been granted a full evidentiary hearing on the issue raised. The court further held that there was no merit to the suggestion of the appeals court that the relationship between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans was entirely speculative. The court cited *Brown v. Board of Education* and *Goss v. Board of Education*, 373 U.S. 683, 689, when it stated that there was no reason for postponing hearings.

Both *Bradley* and *Gilliam* were remanded for further hearings, and the judgments of the court of appeals were vacated.

Bradley v. School Board of Richmond
345 F. 2d 310 (1965)

Background: This was the second time that this case appeared before the fourth circuit court of appeals. The issue in the principle case was whether the Richmond School Board adequately discharged its duty under the law when it gave to every pupil an unrestricted right to attend the

school of his or her parents' choice. The appellants, as plaintiffs, initially brought suit alleging that they had been denied admission to schools that were attended entirely or predominantly by white students.

The trial court ordered the admission of the plaintiffs subsequent to finding that assignments were being made on the basis of dual attendance zones, that promotions from primary to junior high schools and from junior high schools to senior high schools were controlled by a feeder system, and that transfer requests by blacks attending all-black schools were denied on the basis of criteria which were not employed in processing the applications of white pupils living in the same residence area and wishing to attend the same school to which the black student sought to be transferred at (p. 31).

The Richmond School Board adopted resolutions designed to eliminate the objectionable features of the pupil placement system. The resolutions were construed by the district court to provide that every pupil initially entering the Richmond school system, or his parent, was required to state his choice as to the school he wished to attend. In effect, every pupil promoted from elementary school or from junior high school, or his parent, could choose the school that he or she wished to attend. All other pupils would be assigned to their previously attended school, although they would have the right to be transferred to any other school of their choice.

Plaintiffs, the appellants, took the position from this freedom of choice plan was not an appropriate means for eliminating segregation. Appellants alleged that a sufficient number of black parents wanted their children to attend schools that were predominantly or entirely black under the freedom of choice plan. In that respect, appellants claim that under any freedom of choice plan (system), the state "permits" segregation of the school system.

The appeals court took exception to this contention by stating that the Fourteenth Amendment is a proscription against discrimination and not a prohibition against segregation. The appellate court's opinion further stated that there was nothing in the Constitution which prevented one's voluntary association with others of his race or which would strike down any state law which permitted such

association. The opinion went on to say that when a state or a school district grants to all students uniformly an unrestricted freedom of choice as to schools attended, no constitutional requirement is offended.

The opinion cited *Goss v. Board of Education of Knoxville*, 373 U.S. 683, 687, while disapproving a provision for minority transfers, specifically stated that if the plan had provided for transfers regardless of the race of the applicant and the racial composition of the school to which he was assigned, such a plan would permit freedom of choice entirely free of any imposed racial considerations.

In addition to challenging the freedom of choice plan, appellants also contended that the district court did not enjoin the consideration of race in the assignment of teachers and administrative staff. However, the appellate court pointed out that this contention was ignored in the district court hearings in that appellants, as plaintiffs, did not make an effort to develop an evidentiary record showing actual discrimination against pupils. The appellate court found that there had been no inquiry into the possible relationship of teacher assignments to discrimination against pupils and therefore stated that the plaintiffs failed to discharge their burden of showing that such assignments violated their constitutional rights. The opinion further stated that the possible relation between teacher assignments and protection of constitutional rights of pupils need not be determined when it is speculative. In effect, the appellate court upheld the district court's decision by refusing to recognize either of the appellants' contentions.

It should be pointed out that two judges concurred in part and dissented in part. The opinion stated that "while we join in permitting this experiment, we are not fully persuaded that the plan will be enough to enable Negro pupils to extricate themselves from the segregation which has long been firmly established and resolutely maintained in Richmond" at (p. 322). The judges stated that the procedure selected by Richmond could not be separated from the spirit that produced it and that will motivate its application. This partial dissent also indicated that appellants sufficiently raised the question of teacher assignments in the district court and that the question should not be held in limbo indefinitely.

Griffin v. County School Board of Prince Edward County
377 U.S. 218 (1964)

Background: The U.S. Supreme Court ordered Prince Edward County to desegregate its public schools in *Davis v. County School Board of Prince Edward County*, a case which was decided with *Brown v. Board of Education*, 347 U.S. 483 (1954). In order to avoid the desegregation order Prince Edward County implemented the following course of action. First, legislation was passed which would cut off funds to "mixed" public schools. This legislation was invalidated by the Virginia Supreme Court. Second, the legislature initiated a freedom of choice program which allowed the counties to deal with the subject on a county-to-county basis.

Soon after this new legislation was passed the U.S. Court of Appeals Fourth Circuit held that Prince Edward County schools would be enjoined from further discrimination and that the school board should take "immediate steps" to integrate both elementary and high schools. *Allen v. County School Board of Prince Edward County*, 266 F.2d 507 at 511 (C.A. 4th Cir. 1959). This decision was handed down in June 1959 and called for integration by September 1959.

In order to avoid this new order the supervisors of Prince Edward County refused to levy a school tax and as a result, the public schools did not open in September. Instead, in

conjunction with a newly authorized state tuition grant, the supervisors gave an additional tuition grant as well as tax relief to people who supported private schools. The Prince Edward School Foundation was a private organization and it established private schools for white students. The tuition grants proved to be the major source of financial support for the foundation.

In an effort to implement the court of appeal's decision, the plaintiffs sought relief from the district court. Due to certain procedural delays it was not until 1961 when the district court found that the board of supervisor's actions were designed to preserve segregation and enjoined the county from giving tuition grants or tax credits so long as the public schools remained closed. In 1962 the district court further ordered the county to reopen its public schools. The court stated that the county could not keep its public schools closed to avoid the law while Virginia permitted all other public schools to remain open at the taxpayers' expense. The court of appeals reversed, holding that the district court should have refrained from deciding the substantive issues until the Virginia court had dealt with those issues. The substantive issues in question were the validity of the tax credit, the tuition grant and the closing of the schools. There was a case pending in the state courts which would have (and ultimately did) decide at least some of these issues. The United States Supreme Court reversed the court of appeals and held with the district court.

Court Ruling: The court found that there were no procedural grounds which would preclude review and decision of the substantive issues involved. The educational system of Prince Edward County violates plaintiffs' equal protection rights as guaranteed by the Fourteenth Amendment.

Certain procedural issues were raised including (1) the propriety of the supplemental complaint filed by plaintiff; (2) the necessity of a three-judge panel at the district court level; (3) the constitutionality of an action against the state; (4) the propriety of a federal court decision while a state case on the same issue was pending. The Supreme Court found sufficient justification to get past these procedural arguments.

Virginia law unquestionably treated the school children of Prince Edward County differently from all other school children in the state. The equal protection clause of the Fourteenth Amendment does not prohibit a difference in treatment, so long as the purpose or object of that difference is constitutionally permissible. Because a state has wide discretion in deciding which counties shall be bound by which laws, Virginia could lawfully allow Prince Edward County to abandon its public school system, so long as the reason for that special treatment is constitutionally permissible.

Under the facts of this case, the Supreme Court said it was clear that the object of the education system in Prince Edward County was to prevent desegregation. Such a purpose is unconstitutional and the system was invalid.

The Supreme Court cited the case of *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La, 1961), in which the district court invalidated a Louisiana statute which attempted to avoid desegregation by changing the public schools into "private schools" while retaining the

same physical, financial and supervisory structures. The United States Supreme Court affirmed. In this case the Supreme Court recognized the difference between the Louisiana plan and the Prince Edward County plan but said that both were to accomplish the same thing, continued segregation of schools supported directly or indirectly by the state's funds.

The state case pending at the time of these federal court decisions was *County School Board of Prince Edward County v. Griffin* and was decided by Supreme Court of Appeals of Virginia, 204, Va. 650, 133 S.E. 2d 565 (1963). In a decision which was handed down before the United States Supreme Court decision herein briefed, the Virginia court upheld the validity of the tax credit, tuition grant and closing of the schools, under state law. The United States Supreme Court recognized this, but because its decision rested on constitutional grounds, it was not bound by state law.

The Supreme Court said that the district court can enter a decree which will guarantee that plaintiffs will get the kind of education that is given in Virginia's public schools. That decree could include the order already given enjoining the county from giving tax credits, paying county tuition grants and taking applications for such grants because those practices were essential to the county's unlawful education program. In addition, the Supreme Court said that the decree would include an order compelling the county supervisor to levy a school tax and to reopen, operate and maintain without discrimination, the public schools.

After the United States Supreme Court had handed down its decision, the county school board initiated plans to reopen the public schools for approximately 1600 students. That number represented the number of black students within the district; the total number of school age children was almost twice that number.

Soon thereafter, on June 17, 1964, the district court ordered that county funds be used to open and maintain public schools on a non-discriminatory basis. The board of supervisors reopened the public schools for the 1600 black students and allocated \$189,000. The board also allocated \$375,000 in tuition grants for approximately the same number of white students. This occurred at the June 23 meeting. On June 27, 1964 the plaintiffs requested that the district court change its June 17 order to include a permanent injunction on all tuition grants and for other related relief. On July 1, 1964 the State Board of Education passed a resolution authorizing retroactive distribution of tuition grants to include that period when grants were enjoined by court order. Plaintiffs sought a court order restraining this action. They got a temporary injunction on July 2 and a permanent injunction on July 9 (which was the date set for hearing to change June 17 order) as to the retroactive tuition grants. No injunction was placed on future tuition grants. Plaintiffs appealed to have future tuition grants enjoined. While the appeal was pending during a special meeting, the board of supervisors raised the amount of tuition grants from \$100/student to \$300/student. In the middle of that same night the tuition grant checks were distributed and cashed at 9:00 A.M. the next morning; this action involved \$180,000.

The court of appeals said that the district court should enjoin any future tuition grants. The court of appeals said

that under these circumstances, when the state had only nominally changed the structure of the public schools in order to avoid the mandate of *Brown v. Board of Education*, an order enjoining future tuition grants was appropriate because it was probably the only way to get the county to change its practices. The court of appeals went on to say that the clear and unavoidable implication of the *Brown* decision was that white persons have no constitutional right to associate in publicly maintained facilities on a segregated basis.

Related Law Review Articles

1. "Constitutional Law—Equal Protection Clause Affecting State's Closing of Public Schools and Maintaining Private Schools," Aleita Ann Sullivan, 36 *Mississippi Law Journal* 245 (March, 1965).

Green v. County School Board of New Kent County 391 U.S. 430 (1968)

Background: The school board of New Kent County maintained two schools, one on the east side of the county, the other on the west side. These schools were operated on a segregated basis even though the population of the county was not segregated. This system was maintained until 1965 despite the mandates of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and *Brown v. Board of Education* 349 U.S. 293 (1955) (*Brown II*).

In 1965, plaintiffs sought injunctive relief against the dual system. In response to that suit the school board adopted a "freedom-of-choice" plan for desegregating the school system. The plan required students entering the first or eighth grade to affirmatively choose their school and allowed for any other student to change schools if so desired. As a result of the "freedom-of-choice" plan, 115 black students had enrolled in white schools (about 15% of the black students) and no white students had enrolled in the black school.

The district court held that the "freedom-of-choice" plan was adequate and denied the injunctive relief. A second issue involving discriminatory hiring practices was also decided in favor of the school board. The court of appeals affirmed that part of the decision dealing with the "freedom-of-choice" plan but remanded for further consideration on the second issue. The United States Supreme Court reversed the court of appeals as to the "freedom-of-choice" issue and remanded the case to the district court.

The Supreme Court found that the freedom-of-choice plan as implemented by New Kent County School Board would not be accepted as a sufficient step to effectuate a transition to a unitary system as directed by *Brown II*.

The United States Supreme Court reviewed the *Brown II* requirements. *Brown* required that where there was once state-ordered segregation (*de jure* segregation) there was now an affirmative duty on the state to convert to a unitary system and to do so with "all deliberate speed." It had been over ten years since the *Brown II* decision so the United

This note is a summarization of the U.S. Supreme Court's decision in *Griffin* and a brief survey of the decisions involving equal protection and education. The writer concludes that the *Griffin* case gives the courts the power to reopen schools which have been closed to circumvent integration and that the U.S. Supreme Court will nullify any plan aimed at public school segregation.

2. "Recent Developments: Contempt," 65 *Michigan Law Review* 1490 (May, 1967).

This note deals with the action taken by the district court when the County Board of Supervisors distributed the extra tuition grants during the middle of the night. He discusses the propriety of the district court's finding of contempt even though no formal court order had been resisted. This note did not deal with the issue of desegregation.

States Supreme Court decided to readjust the time standard. Now, instead of "all deliberate speed," the court directed the school board to come forward with a plan for desegregation "now." The United States Supreme Court decided that New Kent County did not satisfy this revised standard. The court mentioned several factors which led to that conclusion. Those factors included:

1. The length of time between *Brown II* and New Kent County's first effort at desegregation, that first effort being the freedom-of-choice plan.
2. The freedom-of-choice plan had not, in fact, brought about desegregation which was the ultimate goal of *Brown I* and *II*.
3. There were available other more speedy, and more effective ways for New Kent County to convert to a unitary system, e.g., zoning plan or consolidation of the schools.

The U.S. Supreme Court pointed out that freedom-of-choice plans are not *per se* unconstitutional. Such plans, however, cannot be treated as a substitute for actual desegregation, which is what the school board had argued.

Court Ruling: The transition to a unitary, non-segregated system of public education is the ultimate end to be brought about. Because of the "complexities arising from the transition to a system of public education freed of social discrimination" we provided for "all deliberate speed" in the implementation of the principles of *Brown I*. Yet, the court emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

In the light of the command of *Brown II*, what is involved here is the question of whether the board has achieved the "socially non-discriminatory school system" which *Brown II* held must be effectuated in order to remedy the estab-

lished unconstitutional deficiencies of its segregated system. School boards such as the respondent then operating state-compelled dual system were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which social discrimination would be eliminated root and branch.

The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date", then the plan may be said to provide effective relief.

We do not hold that "freedom of choice" can have no place in such a plan. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. On the other hand, if there are other reasonably available ways promising speedier and more effective conversion to a unitary, non-racial school system, "freedom of choice" must be held unacceptable. The court ruled that the New Kent School Board's "freedom of choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system.

Related Law Review Articles

1. "Review of Recent Supreme Court Decisions," Rowland L. Young, 57 *American Bar Association Journal* 913 (September, 1968).

Brief summary of the U.S. Supreme Court's decision in *Green*.

2. "Recent Cases," 21 *Vanderbilt Law Review* (November, 1968).

Brief summary and outline of the Supreme Court's decision in *Green*.

3. "Recent Decisions: Freedom-of-Choice Plans are Inadequate When a Racially Nondiscriminatory School System is not Achieved," Jean B. Kosinski, 33 *Albany Law Review* 149 (Fall, 1968).

Brief summary of the *Green* case and its companion cases, *Raney v. Board of Education* 391 U.S. 443 (1968) and *Monroe v. Board of Commissioners* 391 U.S. 450 (1968). The writer reviewed the *Brown I* and *Brown II* decisions as well as the Department of HEW guidelines for integration.

The writer also reviews the courts of appeals decisions on desegregation and categorized those decisions into: Theory One—those courts which read *Brown I* and *II* as prohibiting segregation but not ordering integration; and Theory Two—those courts which read those decisions as saying the only school desegregation plans that meet the court's standards are those that in fact do desegregate the schools. The writer emphasizes that the *Green*, *Runey*, and *Monroe* decisions are limited to situations where there had been de jure segregation. The writer speculates as to the impact on areas where only de facto segregation had existed and believes that the same considerations should result in a similar affirmative duty on the latter school districts.

4. "Constitutional Law—Equal Protection: Free Choice and Free Transfer Plans for School Desegregation," 88 *Harvard Law Review* III (1968).

Review of the *Green* case. The author makes some interesting observations and raises some interesting questions. Some of these issues are listed below:

- a. Identification of a broad theory and a narrow theory proposed by the Solicitor General as amicus curiae in opposition to "freedom-of-choice" plan. The Solicitor General, as amicus curiae, contended that *Brown* imposes on states formerly segregated by law the duty not only to end state-compelled segregation, but also to take affirmative steps to undo the racial separation which remains as an effect of past practice, and that that duty is not fulfilled while racially identifiable schools remain. The possible implications of this theory are broad. It might impose on southern states the duty to eliminate racially identifiable schools even where their preservation results from educationally sound pupil assignment policies. Moreover, beyond the field of education, their argument might require southern states to take affirmative action to eliminate racially separate use of any facilities formerly segregated by law. The Solicitor General and petitioners also offered the court a narrower ground of decision by presenting evidence that throughout the South, the choice given to blacks under "free choice" plans is not perceived by them to be, and in fact, is not free; and that given the context of traditional white and black schools in the South, the "free choice" of whites is really foreordained.
- b. Difficulty in ascertaining which theory was adopted by the Supreme Court. The court alluded to this evidence but "neither adopt(ed) nor refuse(d) to adopt" it. The court also did not unambiguously endorse the broader theory.
- c. Various relevant factors mentioned by the court, against the freedom-of-choice plan. Justice Brennan suggested that several factors were relevant to the decision: a long record of bad faith on the part of the school board charged with implementing desegregation, the past history of racial identification attached to the schools in question, the lack of educational or administrative reasons for adoption of the free choice plan, the affirmative activities of the board to facilitate racial separation under the free choice plan, the actual enrollment figures, the undoubted perceptions and attitudes of the black and white communities toward the schools, and the availability of alternative methods which would provide greater racial mixing. It may also have been important that the county population was not predominantly black, and therefore the goal of an integrated education for all black pupils was feasible, absent white withdrawal. Because all these factors pointed in the same direction, *Green* was an easy case: all the justices could concur in the opinion, but perhaps only because the opinion does not set forth any doctrine indicating which of the many relevant factors are crucial.
- d. Problems which may arise when all the factors do not point in the same direction. In more difficult cases, where not all the factors point the same way, the court will have to refine its analysis of the concepts "dual system," "unitary system," "segregated," "integrated," and "racially identifiable." It will have to begin facing some of the hard questions involved in implementing *Brown*.

- e. Problems with the meaning of desegregation. In *Green* the court missed an important opportunity to provide guidance by re-articulating the reasons for and the meaning of "desegregation."

Free choice remains a theoretically permissible system of pupil assignment in the South, but the court has at least made it clear that an end to avoidable racially identifiable schools is a primary goal of desegregation and that free choice cannot be employed if more effective means of achieving this goal are reasonably available. *Green* probably sounded the knell for free choice in the South.

- f. Disregard of the factor that blacks may prefer segregation.
- g. The problem of de facto segregation, especially in the northern schools. The court expressly rejected the suggestion that a decision for petitioners would entail that the Constitution "universally requires 'compulsory integration'". In condemning racial separation in *Green* the court gave no hint whether outside the South separate public education of blacks and whites might in some contexts satisfy the equal protection clause. Since *Green* did strike down free choice in a country representative of large parts of the South and did so without developing principles applicable to the North, the decision may be a step toward the ironic result of required integration in the South coexistent with continued racial separation in the North.
- h. The conflict between *Green* and the HEW guidelines were left unresolved. Finally, the court's steadfast refusal to prescribe a minimum acceptable rate of integration leaves unresolved questions as to the relations between the duty imposed by *Brown* and *Green* and the requirements of the guidelines issued by the Office of Civil Rights of the Department of Health, Education and Welfare pursuant to Title VI of the Civil Rights Acts of 1964.

5. "Case Notes: Constitutional Law—Civil Rights—Free Choice Plans for School Desegregation," Robert S. Peters, 36 *Tennessee Law Review* 400 (Winter, 1969).

Brief summary of the *Green* case and a comparison with *U.S. v. Jefferson County* 372 F.2d 836 (Ct. Ap. 5th Cir., 1966) 380 F.2d 385 (1967). In *Jefferson County* the court of Appeals held that a "freedom-of-choice" plan should not be discarded until it is given an opportunity to work under proper supervision. After *Green* several district courts adhered to *Jefferson County*. Several others found that *Jefferson County* was not compatible with *Green* and followed the latter decision. The writer explained that the "freedom-of-choice" plans became popular because they did satisfy some courts and they did satisfy the Department of HEW guidelines which had to be followed in order to receive federal funds. At the same time it actually allowed the school districts to continue to have racially segregated school systems.

Companion Cases

1. *Raney et al. v. Board of Education of the Gould School District et al.* 391 U.S. 443 (1968).

The facts were similar to *Green*. At the time of *Brown I* there was state-imposed segregation. After *Brown I* the system was changed from state-imposed segregation to segregation by school board policy. In the Gould school district there was one white school and one black school. In 1965, the school board adopted a

"freedom-of-choice" plan to remain eligible for federal funds in accordance with the HEW guidelines. As in *Green*, less than 15% of the black students transferred to the white school. In addition to the low integration rate, 28 black students requested but were denied transfer to the white school due to lack of room. Plaintiff sought injunctive relief against the continued maintenance of an allegedly racially segregated school system.

The district court denied relief saying that the "freedom-of-choice" plan was approved by HEW and that some black students had enrolled in the white school thereby demonstrating that the plan was more than a pretense or sham.

The court of appeals affirmed saying that there was no evidence to support a finding that the school board was not proceeding to carry out the plan in good faith. The U.S. Supreme Court reversed.

Holding:

- I. Quoting from *Green* the Supreme Court said:

(T)he school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden the children and their parents with the responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan, and in light of the courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools. *Raney*, 391 U.S. 443, (pp. 447-48).

- II. The district court should retain jurisdiction and should not dismiss the action in a school desegregation case to insure that:

A constitutionally acceptable plan is adopted and is operated in a constitutionally permissible fashion so that the goal of a desegregated non-racially operated school system is rapidly and finally achieved. *Raney*, p. 449.

2. *Monroe et al. v. Board of Commissioners of the City of Jackson et al.* 391 U.S. 450 (1968).

At the time of *Brown I*, Tennessee law required segregation of schools. After *Brown II* the Board of Commissioners adopted one plan which was rejected by the district court. The board eventually settled on a "free-transfer" plan. This plan called for the creation of zones bounded by geographic or natural boundaries with students residing within that zone attending the school for that zone. The plan also allowed students to transfer to another zone's school if room permitted.

Under the "free-transfer" plan segregation of the schools continued. This was because the general population of Jackson was segregated with the great majority of blacks living in the central city area. The zones were drawn in such a manner that each zone was basically either black or white and where a student did happen to fall into a "wrong" zone he would utilize his transfer option and transfer to a different school.

The plaintiffs sought injunctive relief claiming that the board was continuing to operate a segregated school system. They sought to compel the board to adopt a new plan which would insure desegregation. They urged that a "feeder system" plan be ordered by the court. A "feeder system" is when students from certain elementary schools go to certain junior high

schools and then to certain high schools. This system would allow for the integration of the school system by controlling which students are sent to which schools.

The district court denied relief saying that there was no evidence to prove that the zonal lines were gerrymandered to ensure segregation. The district court also said that the Constitution of the United States does not require that a "feeder system" plan be implemented. The court of appeals affirmed, except on an issue relating to faculty desegregation, which it remanded to the district court for further consideration. The U.S. Supreme Court reversed that part of the court of appeals decision which affirmed the district court.

Holding: Judged by the standards set forth in *Green*, the "free-transfer" plan of Jackson City is clearly inadequate. It does not meet the board's affirmative duty to convert to a unitary system in which racial discrimination is eliminated. The "free-transfer" plan has simply transferred to the children and the parents the burden of dismantling the dual system, while *Brown II* placed that burden squarely on the school board. *Monroe*, p. 458.

The U.S. Supreme Court ordered the board to formulate a new plan. The court stated that the "feeder-system" is an effective alternative reasonably available to the board to abolish the dual system.

Further Action

On remand the district court ordered that the "free-transfer" plan be abandoned, that zonal lines be redrawn and certain other relief. The Board of Commissioners appealed and the court of appeals affirmed the district court in *Monroe et al. v. Board of Commissioners of the City of Jackson et al.* 427 F.2d 1005 (Ct. Pa., 6th Cir. 1970).

The board argued that the U.S. Supreme Court did not prohibit the use of free-transfer plans in all cases and that the Supreme Court specifically allowed for such plans when it would be required by "legitimate local problems," *Monroe*, 391 U.S. 450 (p. 459). The "legitimate local problems" argued by the board were: (1) Without the transfer plan drastic changes in the residential patterns of the city would result; i.e., "white flight". (2) The wide range of academic achievement levels of the black and white students would cause disruption of the educational process if schools were desegregated.

The court of appeals did not refute the board's basic principle that if there were "legitimate local problems" free transfer plan should be allowed. However the court of appeals did reject the board's application of that principle. As to the first alleged "legitimate local problem" the court of appeals said: (1) the proof used to support that claim was extremely limited and speculative and therefore not convincing and (2) Even if the proof was sufficient, the U.S. Supreme Court has said that constitutional principles cannot yield simply because of disagreement with them.

As to the second problem the court of appeals said that more integration, not less integration, will best resolve any disparity of education achievement levels between black and white students. The court of appeals went on to say that the board had not complied with its duty under *Green* or *Monroe* as ordered by the Supreme Court. Because of this non-compliance, the district court was acting properly when it made the order here in question.

As to the issue of integration of teachers the board argued that it had satisfied its duty by making its promotional and placement decisions on the basis of merit and other educational factors. The district court ordered that the board employ, promote and assign faculty in furtherance of the goal of removing former racial identification of the school. The court of appeals said that the district court's order was a proper order to compel compliance with the board's affirmative duty to desegregate, especially in light of the fact that there had been no faculty integration as late as the 1968-69 school year.

In January, 1972, this case was once again before the Sixth Circuit Court of Appeals. At that time the Board of Commissioners had changed the zones for junior and senior high schools but not for the elementary schools. The district court approved the revised zones but ordered the board to seek assistance from the Title VII Opportunities Planning Center. The center could offer only minor changes in the zonal arrangement but it did offer two alternative suggestions as to how desegregation might be better effectuated. Those suggestions were: (1) use of non-contiguous zoning, and (2) use of a "pairing" system. The district court ordered only the zone changes to be implemented.

The plaintiffs appealed and argued that the district court should have ordered the more effective method of desegregation, either non-contiguous zoning or pairing, and that they should have received more in attorneys' fees. The court of appeals affirmed the district court's decision as to the fees but reversed and remanded on the other issues. 453 F.2d 259 (6th Cir., 1972), cert. denied 406 U.S. 945 (1972).

The court of appeals said that in view of the U.S. Supreme Court's decision in *Swann v. Charlotte* 402 U.S. 1 (1971), and in view of its own decisions in *Robinson v. Shelby County Board of Education*, 442 F.2d 255 (6th Cir., 1971), and *Davis v. School District of Pontiac*, 443 F.2d 573 (6th Cir., 1971), this case should be remanded for further consideration. In *Swann* the Supreme Court held that non-contiguous zoning, pairing, and busing are appropriate tools to accomplish desegregation where there once had been state-imposed segregation.

In *Robinson* and *Davis* the court of appeals held that "alternative plans" for providing for greater desegregation must be adopted in preference to less effective plans in order for a board to meet its affirmative constitutional duty, *Monroe*, 453 F.2d 259, 262. The district court was to determine which plan or method for desegregation would be most effective and then order that plan implemented. The Board of Commissioners appealed this decision but the U.S. Supreme Court declined to review the decision when it denied certiorari at 406 U.S. 945 (1972).

This case came before the Sixth Circuit Court of Appeals for the fourth time in October, 1974. See 505 F.2d 105 (6th Cir., 1974). At that time the district court had allowed the Board of Commissioners to close South Jackson Elementary School, awarded attorney's fees to plaintiff and directed that certain modifications be made to the board's desegregation plans. Both sides appealed.

The court of appeals held that: (1) the board had satisfied its burden of proof in demonstrating that the closing of South Jackson Elementary School was not associated with unconstitutional racial overtones; some of the factors which led to that decision were: (a) facilities at South Jackson

were comparatively inferior to other schools due to age and state of repair; (b) the neighborhood was changing from residential to commercial; (c) there was a steady decline in enrollment at South Jackson; and (d) there was no prospect of integration through change in residential patterns; (2)

that the attorney's fees will have to be re-examined by the district court; (3) that the district court shall retain jurisdiction in order to make sure that desegregation is accomplished.

Alexander v. Holmes County Board of Education
396 U.S. 19 (Oct. 29, 1969)

Background: The U.S. Court of Appeals, Fifth Circuit, entered an order requiring that thirty-three Mississippi school districts put into effect certain approved plans for desegregation, 417 F.2d 852 (July, 1969). Upon motion of the Department of Justice and recommendation of the Secretary of HEW, the court of appeals suspended that order on August 28, 1969. The reason given was that more time was needed to properly implement the desegregation plans. The U.S. Supreme Court reversed.

The court felt that the motion for additional time should not have been granted because the standard for allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. The operation of a dual school system must be terminated at once. Fundamental rights of thousands of school children were being denied and both *Griffin v. School Board*, 377 U.S. 218 (1964) and *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) required elimination of dual school systems "now."

Court Ruling: A brief summary of the Supreme Court order is as follows:

1. The court of appeals' order of August 28, 1969, is vacated, and the case is remanded to issue a decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color.
2. The court of appeals may, in its discretion, direct the schools here involved to accept all or any part of the August 11, 1969, recommendations of the Department of Health, Education, and Welfare, with any modifications which that court deems proper insofar as those recommendations insure a totally unitary school system for all eligible pupils without regard to race or color.

The court of appeals may make these determinations and enter its order without further arguments or submissions.

3. While each of these school systems is being operated as a unitary system under the order of the court of appeals, the district court may hear and consider objections thereto or proposed amendments thereof, provided, however, that the court of appeals' order shall be complied with in all respects while the district court considers such objections or amendments. No amendment shall become effective before being passed upon by the court of appeals.

4. The court of appeals shall retain jurisdiction to insure prompt and faithful compliance with its order; and may modify or amend the same as deemed necessary or desirable for the operation of a unitary school system.
5. The order of the court of appeals, dated August 28, 1969, having been vacated and the case remanded for proceedings in conformity with this order, the judgement shall issue forthwith and the court of appeals is requested to give priority to the execution of this judgement as far as possible and necessary.

At the court of appeals level, this case was entitled *United States v. Hines County School Board*. It involved the same school districts as were affected by the *Alexander* decision. On November 7, 1969, the Court of Appeals, Fifth Circuit, issued an order, 423 F.2d 1264. The court of appeals adopted the "permanent plan" as distinguished from the "interim plan"; both plans were prepared by the Office of HEW. It made certain revisions in the plans and ordered the plans as revised to be put into operation by December 31, 1969. The delay was to allow the school districts to take care of the logistical problems involved which included: arranging transfer of faculty, changing of bus routes, finishing grading for the semester, etc. The court of appeals then said how changes in the desegregation plans could be achieved and followed the Supreme Court's order almost verbatim. At least one school district appealed the court of appeals' order but the U.S. Supreme Court declined to review the order, thereby affirming the order *United States v. Hines County School Board*, cert. denied 396 U.S. 1032 (1970).

In August and September of 1970, several school districts which were affected by the November 7, 1969 court of appeals' order sought modification of their desegregation plan. In accordance with the Supreme Court's order, the district court heard evidence pertaining to the modification and then made findings of fact and recommendations for the court of appeals. In most cases the court of appeals adopted the recommendations of the district court, usually with only minor alterations. Examples of the modifications of desegregation plans which were approved by the Court of Appeals can be found at 433 F.2d 598, 433 F.2d 602, 433 F.2d 605, 433 F.2d 611, 433 F.2d 619, and 433 F.2d 622.

In July, 1975, one of the school districts affected by the November 7, 1969 court of appeals' order was again brought before the court of appeals. The school district was operating an all-black school. The United States, as plaintiff, thought that the all-black school was a result of all the white students in the district either transferring to a private school or moving from the district. However, it was discovered that the school board was allowing white students within the

all-black school district to be bused to a different school. The school board argued that the November 7, 1969 order did not say that assignment of students had to be on a strictly neighborhood basis and that the school board had merely made assignments based on bus routes as they existed in 1969.

The court of appeals decided this case which can be found at 516 F.2d 974. The court of appeals said that while it was true that the November 7, 1969 order did not expressly say that assignment of students was to be made on a strictly neighborhood basis, it was clear that the order was not compatible with assignment based on bus routes which were designed for a segregated school system. In order to clarify the situation the court of appeals ordered that the school district "must promptly modify its assignment system to implement strict neighborhood assignment" in regard to the area near the all-black school. 516 F.2d 974, 975. The court of appeals said that the zonal lines were to be drawn equidistant between the all black school and the next closest schools and that the bus routes were to be modified.

In September, 1977, there was concern in one of the school districts in this series of cases about the maintenance of sexually segregated schools. The Court of Appeals, Fifth Circuit, held that sexually segregated schools were in violation of the Equal Education Opportunity Act of 1974. The court of appeals remanded the case to the district court for that court to grant the appropriate relief. *United States v. Hines County School Board*. 560 F.2d 619 (1977).

Also in September, 1977, the actions of another school district were challenged. This time the United States, as plaintiff, alleged the creation of a new school district from part of a larger district which had been ordered to desegregate was improper. The new school district was primarily white. The district court said that the new school district was acceptable because it coincided with one of the zones as proposed by HEW in its desegregation plan.

The court of appeals reversed and remanded. 560 U.S. 118 (1977). The court of appeals said that mere coincidence with an HEW zone cannot legitimize the creation of a new district. HEW zones are modifiable in order to accommodate changed circumstances but school districts are not easily modified. The court of appeals said that the test is whether the creation of the new school district "hinders or furthers the process of school desegregation." *United States v. Hines*, 560 F.2d 1188, 1191 quoting from *Wright v. Council of City of Emporia* 407 U.S. 451 (1972).

The court of appeals went on to say that the U.S. Supreme Court in *Emporia* listed four factors to consider in determining whether the separation of a new school district is proper. Those factors are: (1) disparity in racial composition of the districts; (2) whether separation of school districts caused change in student composition of the districts; (3) whether one district had superior facilities, assets, etc.; (4) whether the timing of the separation conveys to the black students a message of their inferiority. On remand the district court was to weigh these factors in arriving at its decision. The school district did appeal this decision to the

Supreme Court but it declined to review the case. Cert. denied *U.S. v. Hines* 98 S.Ct. 1577 (1978).

Selected Law Review Articles

1. "Supreme Court Decisions," 56 *American Bar Association Journal* 186 (1969).

This article is a brief summary of the U.S. Supreme Court's decision in *Alexander*. It states that the Supreme Court has abandoned the "all deliberate speed" doctrine in regard to desegregation of public schools and has replaced it with the order that segregated school systems must end at once.

2. "Integration Now: A Study of *Alexander v. Holmes County Board of Education*," Patrick J. Doherty, 45 *Notre Dame Lawyer* 489 (Spring 1970).

This article explores the factual background and the judicial history of the *Alexander* case. It sets out sufficient statistical and empirical information so that the reader gets a good idea of what had been happening in the various school districts involved in the *Alexander* case. The article traces the progress of the case through the various courts. It also includes discussion of and excerpts from the petitioner's, the respondent's and the amicus curiae's briefs to the Supreme Court. The article also deals briefly with the reaction of various people to the decision.

3. "The Supreme Court: 1969 Term I. Constitutional Law A. Equal Protection," 84 *Harvard Law Review* 32 (1970).

This article briefly summarizes the *Alexander* case. It then goes on to make several observations including the following: (1) This was not the first time that the Supreme Court said that desegregation must occur "now". It said so in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and in other cases. (2) "Now" cannot mean overnight but the Supreme Court did not say how much time will be allowed. The Supreme Court set no standards for evaluating legitimate excuses from non-legitimate excuses for delay. (3) At least implicit in the decision was that federal courts would no longer be bound by HEW guidelines in deciding cases involving desegregation. The Supreme Court apparently wanted the district courts to exercise a little more independent review. (4) If the Supreme Court decision means that the federal courts are to take over the whole question of desegregation then important judicial decisions will have to be made, including whether or not the Constitution requires desegregation in other areas of society besides schools. (5) The author of the article does not believe that the Supreme Court intended to abandon the HEW guidelines completely. Those guidelines do make decisions easier to reach and it is doubtful that the judiciary wants to undertake the desegregation issue without some assistance from the executive branch. In any event, HEW has become so much a part of the desegregation issue, it does not seem likely that the Supreme Court would be able to remove it from that position even if the Supreme Court intended to do so.

Singleton v. Jackson Municipal Separate School District
419 F.2d 1211 (1970)

Background: This case involves multiple appeals to the U.S. Federal Court of Appeals, Fifth Circuit (hereinafter referred to as Appeals Court). The Appeals Court consolidated the appeals of sixteen major school cases, which involved hundreds of thousands of school children, into this single opinion. The cases were consolidated because in the main they involve common questions of law and fact.

After the Appeals Court decided to consider these sixteen school appeals together, the Supreme Court handed down its decision in *Alexander v. Holmes County Board of Education*, 397 U.S. 19 (1969). The rule espoused in *Alexander* is that continued operation of racially segregated schools under the rationale of "all deliberate speed," is no longer constitutionally permissible. That is, school districts must immediately terminate dual school systems based on race, and operate only unitary school systems. Modifications of or objections to a desegregation order may be considered while the order is implemented, but the implementation cannot be delayed. The Appeals Court held that the above *Alexander* rule must be applied in the instant school case. The Appeals Court further held that although some of the school districts here on appeal had devised plans to convert to a unitary school system, none of these plans complied with the immediacy requirement laid down in *Alexander*. The issue in this case then was what action would be necessary to take by the various school districts here involved in order to satisfy the immediacy requirement laid down by the Supreme Court in *Alexander*.

Court Ruling: Two-step plans were to be implemented in all school districts here involved.

The first step was to be accomplished no later than February 1, 1970, and would include all steps necessary for conversion to a unitary school system, except for the merger of student bodies into a unitary school system.

The second step was to be accomplished no later than the beginning of the fall term of 1970, and would involve the merger of student bodies into a unitary school system.

The Appeals Court appeared reluctant to require relocation of students in the middle of an ongoing school year and, therefore, required desegregation of faculties, facilities, activities, staff, and transportation no later than February 1, 1970 (step one), but delayed integration of the student bodies until the beginning of the fall term of 1970 (step two).

The Appeals Court laid down certain requirements of general applicability to effectuate the two-step plan.

I. Step One

A. Desegregation of Faculty and Other Staff

1. Not later than February 1, 1970, all faculty and other staff who work directly with children at a school would be so assigned so that in no case would the racial composition of a staff indicate that a school was intended for black students or white students. The black to white staff ratio in each school was to be substantially the same as the respective ratio in the entire school system.

Mandatory assignments were to be used when necessary.

2. Staff members who work directly with children, as well as professional administrative level staff, were to be hired, assigned, promoted, paid, demoted, dismissed and otherwise treated without regard to race, color, or national origin.
3. Any reduction in staff or faculty which would result in dismissal or demotion was to be accomplished on the basis of objective and reasonable non-discriminatory (public) standards from among all the staff or faculty of the school district. In addition, no such vacancy resulting from dismissal or demotion could be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed, until each displaced staff member qualified had an opportunity to fill the vacancy, and failed to accept an offer to do so. Demotion is defined as any reassignment:
 - i. under which the staff member receives less pay or has less responsibility than before;
 - ii. which requires a lesser degree of skill than before;
 - iii. under which the staff member is asked to teach a grade other than one for which he is certified, or for which he has substantial teaching experience (5 years) within a reasonably current period.

B. Majority to Minority Transfer Policy

A student attending a school in which his race was in the majority was to be allowed to attend another school (if space is available) where his race was in the minority.

C. Transportation

Transportation systems were to be re-examined regularly by the superintendent, his staff, and the school board. These systems were to be designed to ensure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis.

D. School Construction and Site Selection

All such activity (including placement of temporary classrooms) was to be done in a manner which would prevent the recurrence of a dual school structure.

E. Attendance Outside System of Residence

Any transfers into, or outside the school district were to be granted on a non-discriminatory basis. No transfers where the cumulative effect would reduce segregation or re-enforce a dual school system were to be allowed.

II. Step Two

Merger of Student Bodies into a Unitary School System.

School districts were to request from the Office of Education (HEW) plans for the merger of the student bodies into a unitary system. These plans, additions, and modifications were to be filed with the proper federal district court not later than January 6, 1970, setting out the details of the plan designed to accomplish a unitary system of pupil attendance with the start of the fall 1970 school term. A copy of such plan was to be filed with this Appeals Court.

Editorial Note: Soon after the Appeals Court decided this case, an appeal to the U.S. Supreme Court was taken seeking to reverse the Appeals Court order delaying student integration until the fall school term of 1970 (Step two). The U.S. Supreme Court required immediate desegregation of the student bodies, (citing *Alexander supra*) and thus reversed the Appeals Court decision to delay student relocation. See *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970).

CHAPTER FOUR: BUSING AS A DESEGREGATION TECHNIQUE

Robert Potters
Patrick Tydings
Frank Aquila

Swann v. Charlotte-Mecklenburg Board of Education 402 U.S. 1 (1971)

Background: In 1965 the Charlotte-Mecklenburg (C-M) school board was ordered to desegregate its schools. *Swann v. C-M Board of Education*, 243 F. Supp. 667 (W.D.N.C., 1965), *aff'd* 369 F.2d 28 (4th Cir., 1966). As a result of that court order the school board adopted a rezoning plan and a free transfer plan.

In 1968 the petitioners (plaintiffs) requested that the court order additional relief. That request was based on the argument that the plans in operation did not comply with the U.S. Supreme Court's decision in *Green v. New Kent County School Board*, 391 U.S. 430 (1968) in that the present plan did not achieve a unitary school system.

The district court ordered the school board to formulate a new plan for desegregation because the present plan was not working. The district court recognized that as of June, 1969, 14,000 of the 21,000 black students in the C-M school district still attended schools which were 99-100% black. Throughout 1969 the school board submitted several plans for desegregation to the district court but the district court found none of those plans to be satisfactory. In an effort to expedite the formulation of an acceptable plan for desegregation, the district court appointed an expert to formulate a plan for the court. The expert was Dr. John Finger, appointed in December, 1969, *Swann v. C-M Bd. of Ed.* 306 F. Supp. 1299 (W.D.N.C., 1969) (hereinafter, all citations with no title listed will refer to cases entitled *Swann v. C-M Bd. of Ed.*).

In February 1970 the district court reviewed the desegregation plan formulated by Dr. Finger, 311 F. Supp. 265 (1970). At that time the school board submitted an alternative plan. The two plans were similar in regard to the desegregation of secondary schools and faculties but differed in regard to elementary schools. The Finger Plan called for substantial amounts of busing while the school board's plan called for neighborhood schools which would result in segregated elementary schools. The district court ordered that the Finger Plan be implemented in regard to the elementary schools and that the school board's plan be implemented in regard to secondary schools and faculty.

The court of appeals affirmed the district court in regard to the secondary schools and faculty desegregation plans but vacated the order pertaining to the elementary schools, 431 F.2d 138 (May 26, 1970). The court of appeals thought that the plan for elementary schools would place an unreasonable burden on both the school board and the school

children. The court of appeals remanded to the district court for reconsideration.

The U.S. Supreme Court granted certiorari on June 29, 1970. 399 U.S. 926. The Supreme Court said that it would postpone review of the case until after the district court completed its reconsideration of the elementary school plan. The Supreme Court ruled that the district court's original order of February, 1970 be reinstated, i.e., that the Finger Plan for elementary schools desegregation be reinstated.

On remand the district court found that there were three acceptable plans for desegregation then presented to it and ordered the school board to choose one of those plans or to formulate an acceptable alternative. 318 F. Supp. 786 (August 1970). The school board choose the Finger Plan and the district court issued an appropriate order.

After the district court's order of August, 1970, the Supreme Court continued its review of this case. On April 20, 1971, the Supreme Court affirmed the decision of the district court.

Court Ruling: *Brown I* set out the broad constitutional directive to eliminate dual school systems and establish unitary school systems and "(t)he objective today remains to eliminate from the public schools all vestiges of state imposed segregation" 402 U.S. 1, 15.

This case seeks to define in more precise terms the scope of the duty of school authorities and district courts in implementing *Brown I*. Caveat: It should be noted at the outset that throughout its opinion the Supreme Court makes numerous references to the fact that this case involves a school district which had a history of state-imposed segregation, i.e., de jure segregation, and that the court did not intimate what effect, if any, this decision would have on de facto segregation.

The Supreme Court first addressed the issue of the scope of the district court's power in desegregation cases. The Supreme Court said that where the school board has failed in its duty to end a segregated school system then the district court may act to ensure that the constitutional violations are corrected. In this regard, the district courts have broad equitable powers and may use those powers in fashioning an appropriate remedy. However, those powers are not plenary. The Supreme Court said that the district court may not order a school board to do that which is not neces-

sary for the correction of a constitutional violation, even if the act ordered would be within the power of the school board. For example, the school board could order that racial ratio of each school be at a certain level. A district court could not make such an order on the school board because the constitutional violation could be corrected by an order which would involve less of an intrusion into the realm of the school board.

The school board argued that Title IV of the Civil Rights Act limited the federal court's power to act in desegregation cases. The Supreme Court said that Congress' intent was to prevent an extension of the court's constitutional power to correct de jure segregation. The limiting language, therefore, was intended to preclude the creation of a new statutory power (i.e. correcting de facto segregation) rather than limit the already existing constitutional power.

The Supreme Court addressed certain other aspects of segregation other than student assignment.

1. Quoting from the *Green* case, the Supreme Court said that there were certain important factors which had to be considered in evaluating the propriety of a school system. These factors include policy and practices relating to faculty, staff, transportation, extracurricular activities and facilities. Irrespective of student assignment, if one could tell a "white" school from a "black" school by examining these factors, then there would be a prima facie violation of Equal Protection, and corrective measures would be required. The Supreme Court did note that even if these factors did show segregation, the school board could exonerate itself by removing any invidious racial distinctions.
2. On the issue of teacher assignment the Supreme Court referred to one of the companion cases decided with *Swann*. That case was *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971). In *Davis* the board of commissioners argued that the Constitution only requires that the assignment of teachers be made on a "color-blind" basis and that the district court had no authority to order a particular degree of faculty integration. The court of appeals altered the district court's plan and allowed for substantial or approximate compliance with a stated ratio. The Supreme Court reversed the court of appeals and reinstated the order of the district court. The Supreme Court said that the order of the district court was more in the spirit of the *Green* decision. It was a plan that promises realistically to work now, whereas the court of appeals order would allow for delay because of the difficulty in determining what would satisfy the "substantial or approximate compliance" test.
3. The Supreme Court also discussed the impact of the construction of new schools and the closing of old schools. The court noted that these are two of the most important and most complex functions of the school board and if done in a particular fashion those decisions can foster racial segregation. Therefore, if it is shown that these decisions are being made in such a manner so as to continue racial segregation of schools in a school district where there had been state-imposed segregation then the district court can take that factor into consideration when it fashions a remedy in de-

segregation cases. In other words, the district court must see to it that the school board does not use its position to either continue or re-establish a dual system.

The Supreme Court then went on to discuss the use of student assignment as a method for accomplishing desegregation. In this regard the Supreme Court isolated and discussed four basic problem areas.

1. To what extent may racial balance and racial quotas be used to implement a remedial order to correct a previously segregated system? The Supreme Court said that the Constitution does not require that each and every school in the system have a racial makeup identical to the racial makeup of the total student population. In this case the district court used such a ratio in formulating its order. The Supreme Court said it was permissible to do so in this situation because the district court was merely using that ratio as a starting point in fashioning its order. It was not an inflexible requirement.

The Supreme Court also noted that since *Brown I* the goal of the court has been to eliminate dual school systems where there was once state-imposed segregation. The goal has not been to eliminate all racial prejudice in the community and in any event, school desegregation cases could not possibly serve such a function.

2. Must every all-white and every all-black school be eliminated as part of the remedial process of desegregation? The Supreme Court said there need be no absolute rule against the existence of such schools. The uni-race schools may result from natural changes in neighborhood patterns. However, there will be a presumption against the propriety of such schools when there has been a history of state-enforced segregation and the school board will have a heavy burden of showing that the school assignments are genuinely nondiscriminatory.

At this point the Supreme Court expressed approval of an optional majority-to-minority transfer plan. Such a plan would allow a student, upon request, to transfer from a school where his race is in the majority to a school where his race is in the minority. This, the court said, is a remedy for students who do not desire the stigma of segregation which might attach to the majority race. In order for such a remedy to be effective the state must grant free transportation to those students who wish to transfer and make space available at the school to which he desires to transfer.

3. What are the limits on the rearrangement of school districts and attendance zones when done as a remedial measure? The Supreme Court said that there were limits but that it could not establish any fixed guidelines in this area. The court said that it would rely on the judgement of the district court but any rearrangement must be related to the objective of dismantling the dual school system. The Supreme Court said, "(a)bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." 402 U.S. 1, 28. The Supreme Court said that the pairing and grouping of noncontiguous school zones is a permissible tool to use when assigning stu-

dents based on race in order to correct a constitutional violation.

4. What are the limits, if any, on the use of transportation facilities to correct state enforced racial segregation in schools? The Supreme Court observed that approximately 39% of the nation's public school children were transported to their school by bus in 1969-70 school year. This would indicate that bus transportation is a normal and accepted aspect of educational policy. As such, it is permissible for the district court to use and consider busing as part of the relief which it grants. The Supreme Court said that "desegregation plans cannot be limited to the walk-in school" but left it to the discretion of the district court to decide when the time and distance traveled would either risk the health of the child or significantly impinge on the educational process to such an extent so as to outweigh the interests of desegregation. When making this determination the district court is to consider all relevant factors, and probably the single most important factor will be the age of the children involved.

In this particular case, the Supreme Court noted that under the dual system the average bus ride was over 15 miles per student per one-way trip and involved about one hour riding time per one-way trip. Under the desegregation plan, the average bus ride would be reduced to seven miles per student per one-way trip and only 35 minutes riding time per one-way trip. Therefore, there would be less busing under the desegregation plan and the capital expenditure would be minimal because the school system already had a sizable fleet of buses.

The Supreme Court concluded by making the following observations:

1. This case was an attempt to set some guidelines for the lower courts in this particular area. While these guidelines may be of some help, the burden of fashioning a proper remedy is on the district courts which must exercise their broad discretion in a manner consistent with the sense of basic fairness inherent in equity. In this particular case, the order of the district court was reasonable, feasible and workable; therefore it was proper.
2. Composition of student bodies of particular schools may change over time. However the school authorities are not constitutionally required to make year-to-year adjustments in the racial ratio of schools once the affirmative duty to desegregate has been accomplished. Once desegregation has been accomplished, it should be unnecessary for the federal courts to further intervene unless there is "a showing that either the school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools." 402 U.S. 1, 32.

Further Action: The desegregation of the C-M school district continued to involve the district court for the western district of North Carolina until July 11, 1975, at which time the district court was able to remove this case from its active docket. Up to that time various modifications of the desegregation plan were sought and were considered by the

district court. On at least two occasions the decisions of the district court were appealed to the Fourth Circuit Court of Appeals. It was not until the 1974-75 school year and the election of a new board of education, a board more compatible with the idea of desegregation, that the C-M school district came into compliance with the orders of the district court and the mandates of the Constitution.

Related Cases

1. *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971). See page 5 *supra*, p. 2
2. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971).

In an effort to prevent desegregation of the Charlotte-Mecklenburg School District as ordered by the District Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 318 F. Supp. 786 (1970), the North Carolina legislature passed an anti-busing statute. Plaintiffs challenged the constitutionality of the statute. The district court and the court of appeals held that the statute was invalid. The Supreme Court affirmed.

Holding: State law must give way when it operates to hinder vindication of federal constitutional guaranties.

Reasons: The absolute prohibition of any assignment of any student based on race, while it appears to be neutral and "color blind", must be examined carefully when implemented by a state which has a history of segregation. In this case, upholding the statute would obstruct the remedies granted by the district court in *Swann*. To allow such a prohibition would remove the one essential tool for fulfillment of the constitutional duty to eliminate dual school systems. Also, such an absolute prohibition contravenes "the implicit command of *Green* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46.

Related Law Review Articles

1. "Supreme Court Report", Rowland L. Young, 57 *American Bar Association Journal* 711 (July, 1971).

Brief review of the *Swann* decision and related cases. The writer observes that the Supreme Court did not discuss the problem of de facto segregation; that "awkward, inconvenient, and even bizarre" remedies may be necessary where the school board has deliberately designed a school system so as to enforce racial segregation; and that satellite zones, pairing, grouping, and busing are permissible methods to use in achieving desegregation.

2. "On Insulating Busing from Congressional Review: The *Swann* Right to a Racial Mixture", Charles C. Shepherd, Jr., 22 *American University Law Review* 795 (Summer, 1973).

The main thrust of this comment is that the Supreme Court in *Swann* did not merely approve a new remedy in the area of school desegregation, but that the Court promulgated a new or different constitutional right. The writer argues that *Swann* went beyond both *Brown* and *Green* by saying that a unitary school system requires the "greatest possible degree" of racial mixing. The "greatest possible degree" is a new constitutional rule and because busing is the only way to effectuate such mixing, it is so intertwined

with the right that busing has become part of the constitutional right itself. This is important, the author says, because if the right of busing is truly part of the constitutional protections, then Congressional legislation would not be able to alter that right; a constitutional amendment would be required.

3. "From Brown to Swann: The New Role of Equity in Integration", Russell Serafin, 23 *Baylor Law Review* 555 (Fall, 1971).

This comment reviewed the Swann decision and concluded that while the Supreme Court said that the district court has wide discretion in fashioning a remedy for desegregation the Supreme Court nevertheless left many questions unanswered. The main unanswered questions included: (a) What will happen with de facto segregation? (b) How can segregation be corrected when it is imposed by other than school officials? (c) Who else, besides school officials, could impose state-ordered segregation of schools? The writer maintains that busing is merely a remedy available to aid in desegregation and that its absence is not automatically a constitutional violation. It is available as a remedy only because it is within the range of power of school authorities. There may also be defenses to forced busing including great risk to health of child or significant impingement of the educational process.

4. "Constitutional Law—School Desegregation—Guidelines in Implementation", Eugene P. Daugherty, 21 *DePaul Law Review* 562 (Winter, 1971).

Summary of the school desegregation cases up to and including the Swann decision. In his conclusion, the writer expresses the opinion that the rationale applied to Swann should be applicable to cases involving de facto as well as de jure segregation of schools.

5. "Civil Rights—Busing as a Remedy for School Segregation", 85 *Harvard Law Review* 74 (November, 1971).

This is a review of the Swann decision. The writer pointed out several problems which the Supreme Court did not resolve, including: (a) What is the goal of desegregation, i.e., what is a "unitary system"? (b) How to decide which systems are dual and therefore susceptible to judicial intervention? (c) What remedies should be applied by the district courts? Although the Supreme Court did not elucidate any detailed guidelines for desegregation, some guidance may be extracted if you look upon the Charlotte-Mecklenburg school system as a role-model type for other school systems to copy. This would leave room for flexibility and deviation and this would be preferable to rigid, detailed guidelines.

The writer also alluded to the problems of one-way busing. Some courts will not allow this remedy unless it is the least burdensome alternative available. *Haney v. County Board of Education*, 429 F.2d 364 (8th Cir. 1970); *Brice v. Landis*, 314 F. Supp. 974 (N.D. Cal. 1969). Other courts have allowed one-way busing under less compelling circumstances. *Norwalk Core v. Norwalk Board of Education*, 298 F. Supp. 313 (D. Conn. 1969), affirmed 423 F.2d 121 (2nd Cir., 1970); *Allen v. Asheville City Board of Education*, 434 F.2d 902 (4th Cir., 1970).

6. "Civil Rights v. Individual Liberty: Swann and Other Monsters of Impetuous Justice", Nile Stanton, 5 *Indiana Legal Forum* 368 (Spring, 1972).

This comment briefly reviews the history of the Fourteenth Amendment as it has been applied to school desegregation cases, up to and including the Swann decision. The writer comments on how the Supreme Court has not addressed the question of de facto segregation and that the court may now be ready to do so since it had granted certiorari in the *Keyes v. School District No. 1* case. 445 F.2d 990 (10th Cir., 1971) cert. granted 92 S.Ct. 707 (1972). The writer also said that Swann's utility is not found in the actual guidelines which it formulated. Rather, its utility is found in the fact that now there is a Supreme Court-approved model for a desegregation school system.

However, this writer maintains that Swann should be overruled because it is an attempt "to foist upon the public the notion that equality of condition, as opposed to equality of opportunity, is a constitutional right and that it can be achieved by judicial fiat", 5 *Ind. Leg. Forum* 368, 378. The writer argues that the proscriptive language of the Fourteenth Amendment is not an appropriate basis for the imposition of an affirmative duty such as that imposed by Swann. The writer concludes by saying that the judiciary has overstepped its limits and the fact that the judiciary is trying to formulate a remedy in furtherance of a socially identifiable goal, is not sufficient justification.

7. "Busing—A Permissible Tool of School Desegregation", Adrienne Sepanik, 49 *Journal of Urban Law* 399 (November, 1971).

This article reviews the historical background to the Swann decision and gives some attention to the issue of de facto segregation and the court's decisions pertaining thereto. The writer cites several cases involving de facto segregation including: *Bell v. School City of Gary*, 213 F. Supp. 819 (1963), aff'd 324 F.2d 209, cert. denied 371 U.S. 925 (1964); *Jackson v. Pasadena School District*, 59 Cal. 2d 876 (1963); *Taylor v. New Rochelle Board of Education*, 191 F. Supp. 181 (1961).

The article then capsulizes the Supreme Court's decision in Swann and it concludes by hypothesizing that the Swann decision could be an indicator that the Supreme Court may be going to move into the area of de facto segregation.

8. "Note: Schools, Busing and Desegregation—the Post-Swann Era", 46 *New York University Law Review* 1078 (December, 1971).

The writer of this note contends that the lack of action on the part of school boards toward desegregation is a result of the Supreme Court's focus on the intricacies of the plans for desegregation rather than the effectiveness of the plans. The writer maintains that the Supreme Court should be more result-oriented even if it means dealing with a difficult political issue, because such an approach would alleviate many of the problems existing in this area.

The article then reviews the history of desegregation cases including the Swann decision and points out several problems left unanswered by Swann, including: (a) What action, if any, need be taken to correct de facto segregation? (b) What distinguishes de jure and de facto segregation? (c) Must there be a history of busing in the school district before it is an available remedy? (d) Who should bear the burden of desegregation?

The writer argues that most of the confusion which surrounds the desegregation cases could be eliminated if the Supreme Court used a rule that evaluated the result of a desegregation plan rather than the mechanics of the plan. The district court's approach in *Swann* was seen as such a result-oriented rule it required the attainment of a specific racial ratio to satisfy the duty to desegregate.

This article also dealt briefly with the concept of affirmative action and some of the arguments against it.

9. "Busing, *Swann v. Charlotte-Mecklenburg*, and the Future of Desegregation in the Fifth Circuit", Henry Stratford May, Jr., 49 *Texas Law Review* 884 (May, 1971).

Review of the desegregation cases especially as applied in the Fifth Circuit, a review of the *Swann* decision and a prediction of what the courts of the Fifth Circuit will do in the future.

This writer believes that the Supreme Court added to the hazy meaning of certain phrases such as unitary system, dual system and desegregation. For example, the Supreme Court said that desegregation means substantial racial mixing must be achieved, although the article was quick to point out that the Supreme Court did not say how much mixing had to be done.

The article concludes by saying that the *Swann* decision places a heavy burden on the judiciary, especially on the Fifth Circuit because that is where most of the southern school desegregation cases arise. The writer hopes that the Fifth Circuit courts do not abandon this burden.

10. "The Road to *Swann*: Mobile County Crawls to the Bus", L.A. Powe, Jr., 51 *Texas Law Review* 505 (March, 1973).

This article gives a very brief background of the school desegregation cases. It then proceeds to do a case history of the process of desegregation in the Mobile County School System in Alabama.

11. "Swann and School Segregation—The Equitable Powers of Federal Courts to Implement *Brown v. Board of Education*", 3 *Texas Tech Law Review* 99 (Fall, 1971).

This article gives a brief overview of the desegregation cases including the *Swann* decision. It explores how *Swann* has affected the vital considerations of desegregation, i.e. faculty and staff assignments, facilities, transportation, extracurricular activities and composition of student bodies. In connection with this last consideration the writer deals with the questions of student quotas and transportation of students. The writer concludes that the Supreme Court does require integration to a degree substantially close to the racial composition of the whole school system and that busing is an acceptable tool to achieve that goal, though it is by no means the only acceptable tool.

12. "The *Charlotte-Mecklenburg* Case—Its Significance for Northern School Desegregation", Owen M. Fist, 38 *University of Chicago Law Review* 697 (Summer, 1971).

First this article explores how the *Swann* decision transcended the *Green* decision. There were four main steps taken in *Swann* which were not taken in *Green*. Those steps were: (a) *Swann* rejected a system of assignment based on geographic zones whereas *Green* rejected a freedom of choice plan. The move could have

far reaching effects because most Northern states make assignments based on geographic zones. The court showed that such a system is not above reproach. (b) *Swann* demonstrated the willingness of the Supreme Court to presume impermissible segregative intent, even if such presumption involves "significant elements of conjecture", when there is a history of past segregation. (c) *Swann* increased the duty of the school board from merely taking integration into consideration to a duty, to "achieve the greatest possible degree of desegregation". (d) *Swann* approved the use of considering race as a criteria for student assignment when the goal is integration rather than segregation. This would show that the Constitution is not truly color blind.

The writer then argues that these steps demonstrate that the Supreme Court is ultimately concerned with segregated patterns of school attendance rather than the casual role of past discrimination. To rectify this ultimate concern the court has used past discrimination as a basis for its constitutional argument. However, when that basis is not longer viable, the court will abandon it and go to another, at all times keeping its focus on the ultimate concern. One possible alternate basis is when segregation results, the school board is presumed to be responsible for the foreseeable and avoidable consequences of its actions and therefore it is presumed that the school board intended segregated schools. If this presumption is not rebutted then the courts may act to correct the situation. This alternative may be a workable way to attack de facto segregation in the North.

The article concludes by saying that local agencies are free to change their school systems without court action and that the Supreme Court's attitude in *Swann* may prompt such changes, if for no other reason than the officials may be concerned that the Supreme Court may do it for them if they delay much longer. Also, political pressure from the South may cause Congress to adopt some uniform approach to desegregation so that the North will not be insulated from any duty to desegregate merely because it has no history of de jure segregation.

13. "School Desegregation After *Swann*: A Theory of Government Responsibility", 39 *Chicago Law Review* 421 (Winter, 1972).

This comment says that *Swann* focused on the remedial aspects of desegregation but it did not deal with establishing guidelines as to when segregation would be considered "state-imposed". It reviews some general theories as to when the government should be responsible for segregation. There is a review of the lower court cases subsequent to *Swann* in order to show how the lack of such guidelines has caused confusion in the lower courts.

The article concludes by suggesting one such standard or guideline. If there is a racial imbalance in the schools then the school board will have to show a compelling interest to justify that imbalance. Such a standard, it is argued, would cover the Southern school systems with their history of past de jure segregation, and it would also cover the Northern school systems where the neglect or indifference of the state has allowed racial imbalance to occur.

14. "Recent Cases: Civil Rights: Desegregation", 24 *Vanderbilt Law Review* 1234 (November, 1971).

Brief summary of the desegregation decisions including the Swann decision. The writer says that the use of busing as a tool in desegregation was a logical continuation of the Supreme Court's tendencies in this area. The writer recognizes that the Court's main objective in desegregation cases is to secure an equal educational opportunity for all students. However, the writer foresees the opposite results flowing from the Swann decision. The writer hypothesizes that the main impact of Swann will be felt in the public reaction thereto and that "white flight" will become even more prevalent. Eventually the public school system will become a uni-race system thereby denying any possibility of equal educational opportunity. The writer believed that the goal of equal educational opportunity would better be attained by the use of less drastic

methods of desegregation such as redrawing zone lines or better placement of new schools, etc.

15. "Swann v. Charlotte-Mecklenburg Board of Education: Roadblocks to the Implementation of Brown", J.W. Montgomery, III, 12 William & Mary Law Review 838 (Summer, 1971).

This article was written before the Supreme Court rendered its decision in Swann, therefore it is not an examination of that decision. Rather, it is a preview of the issues which were presented in Swann and a prediction as to how those issues would be resolved. The main issues discussed were: (a) What role would the Civil Rights Act of 1964 play in the decision? (b) Would the de jure/de facto distinction continue to be viable or controlling? (c) What role would the Supreme Court's earlier decisions play in this decision?

United States v. Scotland Neck City Board of Education 442 F. 2d 575 (1971)

Background: This was an appeal by the Scotland Neck City Board of Education and the State of North Carolina of an order issued by the district court for the eastern district of North Carolina. The district court order declared Chapter 31, a North Carolina statute, unconstitutional and permanently enjoined any implementation of the provision. Chapter 31, enacted by the North Carolina General Assembly, provided for a new school district bounded by the city limits of Scotland Neck. In a referendum, the voters of Scotland Neck approved the new provision.

Prior to the enactment of Chapter 31, Scotland Neck was part of the Halifax County School District. Shortly after Chapter 31 was enacted the United States Justice Department filed a suit against the Halifax County Board of Education. The suit sought to disestablish the dual school system operated by the board. Also, an injunction was requested to enjoin implementation of Chapter 31.

Court Finding: In its review of the statute, the appeals court stated that Chapter 31 was not unconstitutional on the surface. However, the validity of the statute would have to be judged relative to the problem it was meant to solve. The appeals court noted the three purposes found from the evidence by the district court for enacting Chapter 31. First, Scotland Neck wanted more local control over their schools. Second, Scotland Neck wanted to increase the expenditures for their schools through local supplementary property taxes. Third, Scotland Neck wanted to prevent anticipated white flight from the public schools.

The court found that the needs for local control and increased taxation may have been noteworthy and legitimate for increasing the quality of education in the Scotland Neck schools. However, the third purpose, which was to prevent or at least diminish the flight of white students from the public schools, was suspect. The population of Halifax County was predominantly black, while that of Scotland Neck was approximately 50 percent black and 50 percent white. The court noted that the threat of white flight would not justify the continued operation of a dual school system.

The court also recognized that no decisions held that a school board, or a state, could not constitutionally consider and adopt measures for the purpose of curbing or diminishing white flight from a unitary school system.

The test was whether the effect of Chapter 31 was to continue a dual school system in Halifax County, or establish one in Scotland Neck. If this was the effect, the desire to stem an impending flow of white students from the public schools would not save the statute from constitutional invalidation.

The court stated that it was important to distinguish the effect of Chapter 31 from the effect of a transfer plan adopted by the Scotland Neck Board of Education. In making this distinction, the court stated that the effect of the transfer plan was to substantially increase the percentage of white students in the Scotland Neck schools. The court further stated that the transfer plan was solely the product of the Scotland Neck school board and not Chapter 31. Therefore, in the court's opinion, the effect of the transfer plan had no relevance to the question of the constitutionality of Chapter 31.

The court held that the effect of the separation of the Scotland Neck schools and students on the desegregation of the remainder of the Halifax County school system was minimal and insufficient to invalidate Chapter 31. The court supported this holding on two points. First, the Halifax County schools would have a substantial majority of black students whether the Scotland Neck students remained within the Halifax County system or attended separate schools of their own. Second, although there were more white students than black students in Scotland Neck, the white majority was not large.

The court therefore reversed the judgment of the district court holding Chapter 31 unconstitutional, and remanded for dissolution of the injunction. The district court was also to retain jurisdiction to consider proposed plans of the Halifax County and Scotland Neck school systems.

United States v. Scotland Neck City Board of Education
407 U.S. 484 (1972)

Background: This appeal involved a challenge to the implementation of a North Carolina statute which authorized the creation of a new school district for Scotland Neck, a city in North Carolina. The facts which led to the appeal are as follows. Scotland Neck had been a part of the Halifax County Administrative Unit, a school district comprising the entire county except two towns located in the northern section of the county, since 1936. The schools of Halifax County were completely segregated by race until 1965, when the school board adopted a freedom-of-choice plan. The plan produced very little actual desegregation. By the 1967-68 school year, all of the white students in the county attended the four traditionally all-white schools, while 97% of all the black students attended the 14 traditionally all black schools. In addition, the school busing system, used by 90% of all students, was segregated by race. The faculty had minimal desegregation. In an attempt to bring the county's schools into compliance with federal law, the U.S. Justice Department entered into negotiations with the county. An interim plan was recommended by the North Carolina Department of Public Instruction, but after the plan had been submitted to the county school board, a bill was introduced and enacted by the state legislature. The bill was Chapter 31 of the 1969 Session Laws of North Carolina. The legislation, upon the approval of a majority of Scotland's voters, authorized the creation of a new school district bounded by the city limits of Scotland Neck.

The effect of Chapter 31 was to create a new school district out of the Halifax County school district. The new district would have 695 students, 399 (57%) of whom were white and 296 (43%) that were black. The new district also devised a transfer plan whereby 360 students (350 white and 10 black) living outside the city limits applied to transfer into the Scotland Neck schools. Forty-four students, all black, applied to transfer out of the city district to a nearby school in Halifax County. Plans were to use the facilities of the formerly all-white Scotland Neck High school and one building, located outside the city limits, which would be leased.

The United States filed suit seeking desegregation of the existing Halifax County schools and asked for preliminary and permanent injunctions against the implementation of Chapter 31. After a hearing, a preliminary injunction was issued by the district court. The district court found that the act, in its application, created a refuge for white students, and promoted segregation in Halifax County schools. The

district court also found that the act impeded and defeated the efforts of the Halifax County Board of Education from implementing plans to completely desegregate all of the public schools in Halifax County. The act was eventually found to be unconstitutional and its implementation was permanently enjoined. The Supreme Court granted certiorari after the court of appeals reversed the district court.

In its review of the case, the Supreme Court stated that any attempt by state or local officials to create a new school district from an existing school system must be judged according to whether it hinders or furthers the process of school desegregation. Where the proposal impedes the dismantling of a dual system, a district court may enjoin it in the exercise of its remedial discretion.

The Supreme Court pointed out that the major impact of Chapter 31 was in a portion of Halifax County where the projected enrollment under the earlier interim plan would have been 2,948 students, of whom 78% would have been black. However, under Chapter 31, the Scotland Neck schools would be 57% white, while those remaining in Halifax County would be 89% white. In addition, the traditional racial identities of the schools of this particular area would be maintained. The traditional all-white school in Scotland Neck would remain as such—while the formerly all-black school located just outside Scotland Neck would be 91% black.

The court stated that judges or school authorities should make every effort to achieve the greatest degree of actual desegregation, and that in formulating a plan to remedy state-enforced school segregation there should be a presumption against schools that are substantially disproportionate in their racial composition 407 U.S. 490. The court noted the disparity in the racial composition of the Scotland Neck schools and the schools remaining in the affected area of the Halifax County system would be substantial. The court also noted the evidence, showing what it characterized as the enthusiastic response among whites residing outside the newly created Scotland Neck School District to the proposed transfer plan. The court stated these facts tended to suggest that the Scotland Neck school was to be the white school of the area, while the affected area in Halifax County would remain the black school. Based upon these facts the court concluded that the implementation of Chapter 31 would have the effect of impeding the disestablishment of the dual school system that existed in Halifax County. The court of appeal's decision was reversed.

Wright v. Council of City of Emporia
407 U.S. 451 (1972)

Background: Certiorari was granted in this case to consider the circumstances under which a federal court may enjoin state or local officials from creating a new school

district from an existing district that has not yet completed the process of dismantling a system of enforced racial segregation. Emporia is a city located near the center of

Greenville County, which is itself a largely rural area on the North Carolina border.

In 1965, a complaint was filed seeking an end to state-enforced racial segregation in the Greenville County school system. Prior to 1965, the elementary and high schools located in Emporia served all white children in the county while black children throughout the county were assigned to a single high school or one of four elementary schools, all but one of which were located outside the Emporia town boundary. In 1966, the district court approved a so-called "freedom of choice" plan that had been adopted by the county. Under this plan no white students ever attended the black schools and only 98 of the county's 2,510 black students attended the white schools. The school faculties remained completely segregated. A motion for further relief was filed, citing as a basis to relief a Supreme Court holding that a freedom-of-choice plan was an unacceptable method of desegregation where it failed to provide meaningful assurance of prompt and effective disestablishment of a dual system. The district court ordered the county to demonstrate its compliance with this previous Supreme Court holding, or to submit a plan designed to bring the schools into compliance.

In reply, the county submitted two plans. One plan would have preserved the existing system with slight modifications. The other plan would have assigned students to schools on the basis of curricular choices or standardized test scores. The district court flatly rejected the former plan and took the latter under advisement. The district court was presented with an alternative plan by the petitioners. This plan proposed that all children enrolled in a particular grade level would be assigned to the same school, thus eliminating any possibility of racial bias in pupil assignments.

Court Ruling: The district court rejected the county's alternative plan, finding that it would substitute one segregated school system for another segregated school system. The district court then ordered the county to implement the plan submitted by the petitioners. This plan was referred to as the "pairing" plan.

Two weeks after the district court entered its decree, the Emporia City Council sent a letter to the county Board of Supervisors. The letter expressed the city's intention to operate a separate school system. The city officials did not meet with the county council or school board to discuss the implementation of the pairing decree, nor did they inform the district court of their intention to create a separate school system.

Petitioners filed a supplemental complaint to include the members of the Emporia City Council and city school board as additional parties defendant and to enjoin them from withdrawing Emporia children from the county schools. The establishment of a separate school system by the city was found to be an impermissible interference with and frustration of a court order to desegregate. The city was preliminarily enjoined from taking any actions which would interfere in any manner with the implementation of the district court order.

In a further hearing, the city presented an expert witness to testify about the educational advantages of the proposed city system. The city asked that the preliminary injunction be

dissolved. However, the district court denied the request and made the injunction permanent. The city appealed to the court of appeals of the Fourth Circuit. The district court's decision was reversed, but the appeals court deferred issuing a ruling pending the outcome of a review by the United States Supreme Court, which had granted certiorari.

The position of Emporia, before the Supreme Court, was that it was a separate political jurisdiction entitled to establish a school system independent of the county under state law. It may be enjoined unless upon a finding either that the state law under which it acted was invalid, that the boundaries of the city were drawn as to exclude blacks, or that the disparity of the racial balance of the city and county schools violates the Constitution. The court rejected these arguments.

The court pointed that Emporia had always educated its children in the county schools but when segregation in the county schools was ordered abolished, the city attempted to remove its children out of the county system. Under such circumstances, the power of the district court to enjoin Emporia's withdrawal from that system did not have to rest upon an independent constitutional violation. The district court's remedial power was invoked on the basis of a finding that the dual school system violated the Constitution. Since the city and county constituted but one unit for the purpose of student assignments during the entire time that the dual system was maintained, they were properly treated as a single unit for the purpose of dismantling that system.

The court also found that the effect of Emporia's proposal would have been to erect new boundary lines for the purpose of school attendance in a district where no such boundary lines existed, and where segregation flourished. Emporia's proposal therefore had to be judged according to whether it hindered or furthered the process of school desegregation. If the proposal impeded the dismantling of the dual system, then the district court, in the exercise of its remedial discretion, could enjoin it from being carried out.

The court of appeals found that the primary purpose of Emporia's creation of the schools was "benign", and was not "merely a cover-up" for racial discrimination. However, this "dominant purpose" test has no precedent in prior court decisions. The court noted that it was difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. The same can be said of the choices of a school board. The court further noted that an inquiry into the dominant motivation of school authorities was as irrelevant as it was fruitless. The mandate of *Brown II* was to desegregate schools, and the measure of any desegregation plan is its effectiveness. Therefore, the court must focus upon the effect and not the purpose or motivation of a school board's action in determining whether that action was a permissible method of dismantling a dual school system. It was also stated by the court that the existence of a permissible purpose could not sustain an action that has an impermissible effect.

The court stated that a disparity in the racial composition of the two systems would not necessarily, standing alone, be a sufficient reason to enjoin the creation of a separate school district. However, a review of Emporia's action involved more than disparities in racial percentages. First, the

district court found that if Emporia were allowed to withdraw from the county system, there would have been an influx of whites to the Emporia school system. Second, the two formerly all-white schools were located within Emporia, while all the schools located in the surrounding county were formerly all black. In addition, it was found that the school buildings in Emporia were better equipped and were located on better sites than those in the county. Third, the timing of Emporia's action was suspect. While Emporia had long had the right under state law to establish

a separate school system, such a decision came only after a court order to desegregate the county schools. The council found that the district court properly considered the aforementioned factors relative to their effect upon the process of desegregation.

The court therefore held that, given the totality of the circumstances, the district court was justified in its conclusion that Emporia's establishment of a separate school system would impede the process of dismantling the dual school system. The appeals court decision was reversed.

CHAPTER FIVE: DESEGREGATION MOVES NORTH

Thomas Black
Patrick Tydings
Bruce Graham
Frank Aquila

Keyes v. School District No. 1
413 U.S. 189 1973

Background: The Denver, Colorado school system had never been operated under a statutory or constitutional provision that mandated or even permitted racial segregation in public education. Nevertheless, a good deal of segregation did result within the school system. Two areas were particularly demonstrative of this segregation. They were the Park Hill area and the core city area. In those two areas minority students comprised between 70-90% of the student enrollment in most of the schools.

In an effort to correct this segregation the school board passed three resolutions which would have essentially desegregated the Park Hill area. Before these resolutions were implemented, a new school board was elected and the new board sought to rescind those resolutions. This case was commenced when the plaintiffs sought to prevent the rescission of those resolutions. The plaintiffs claimed that there was de jure segregation because (1) there was actual segregation and (2) the school board had created or maintained racially and/or ethnically segregated schools through the use of various techniques such as manipulation of attendance zones, selection of sites for new schools, the use of mobile classrooms, the use of optional zoning, etc. These facts, the plaintiffs claim, would have entitled them to a court order directing desegregation.

The district court held that the plaintiffs had proved segregative intent and segregative actions in regard to the Park Hill area and that they were entitled to relief. The district court ordered that the three resolutions be implemented as they were originally intended. 303 F. Supp. 279, 303 F. Supp. 289 (D.C. Col., 1969).

A few months later the plaintiffs sought a court order directing the school board to desegregate the core city area. The district court recognized that the core city area was in fact segregated but the district court said that there was no showing of segregative intent in regard to that area. The district court said that although there was a finding of segregative intent in regard to the Park Hill area, that finding was in no sense material to the question of intent in regard to the core city area. The district court held that the plaintiffs had not met their burden of proving de jure segregation in regard to the core city area; therefore the district court would not be able to order desegregation under the *Brown* or *Swann* cases.

However, the district court found that the schools of the segregated core city area were educationally inferior to the predominantly white schools of the district. This, the district court said, violated the doctrine of "separate but equal" as established in *Plessy v. Ferguson* [163 U.S. 537 (1896)]. The district court said the Constitution directs that the school board "must at a minimum. . . offer an equal educational opportunity." 313 F. Supp. 61, 83. While the court said it could not order all-out desegregation, it did say that it could order desegregation and integration to some extent because that was the only "feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality" 313 F. Supp. 90, 96. The district court then ordered various remedies to implement the program.

The district court's orders relating to Park Hill and the core city areas were consolidated on appeal. The Tenth Circuit Court of Appeals affirmed the order pertaining to the Park Hill area but reversed the order as to the core city area. The court of appeals could find no basis for the constitutional duty formulated by the district court and therefore rejected the idea. The court of appeals agreed with the district court's holding that the segregative intent in one area of the school district has no relevancy to the existence of such intent in another area of the same school district. Therefore, the court of appeals concluded that there was no basis for ordering desegregation in the core city area. 445 F.2d 990 (10th Cir., 1971).

The U.S. Supreme Court granted certiorari as to that part of the decision which involved the core city schools. Certiorari was denied as to the Park Hill schools.

Court Ruling: The Supreme Court modified the decision of the court of appeals so as to vacate rather than reverse the decision of the district court. The Supreme Court then remanded the case to the district court for further consideration in accordance with this opinion.

I

The majority of Denver students were white although there was a significant number of both black and Hispanic students. The school board argued that a school was segregated within the meaning of the Fourteenth Amendment

only when a certain percentage of students belong to one minority group, i.e. black or Hispanic, and that if it is only the combined total of all minority groups which exceed that certain percentage then there is no violation.

The Supreme Court disagreed with this argument. The Supreme Court held that for the purpose of determining whether or not a school is "segregated" black students and Hispanic students must be placed in a single category and that combined total will determine whether or not that certain percentage has been obtained. The Supreme Court combined these two minority groups because the Court felt they had many things in common including: suffering from the same educational inequities, economic deprivation, from discrimination. Therefore, any school which had a combined total of black and/or Hispanic students above that certain percentage would be considered segregated in fact. Such a finding is an absolute prerequisite for the findings of a constitutional violation.

II

A showing of segregation in fact is only the first step in plaintiff's case. It must also be shown that the segregation was brought about or maintained by intentional state action. Actions taken by the school board are sufficient to satisfy the state action requirement but some additional showing must be made in order to demonstrate that segregative intent was involved. The Supreme Court referred to two possible ways to show this segregative intent:

1. The Park Hill schools and the related discriminatory actions of the school board affected approximately 37% of the total black student population of Denver. The Supreme Court designated that percentage as a substantial part of the school system. There had been a finding of segregative intent in regard to the Park Hill portion of the district, and the Supreme Court did not disturb that finding.

The school board argued that state-imposed segregation in one part of the school district does not mean that the entire district is being operated as a dual system and that a showing of segregative intent as to one part of the district should have no bearing on other parts of the district. The district court and the court of appeals accepted this argument. The Supreme Court rejected it. The Supreme Court said, "We do not agree. We have never suggested that plaintiffs in school desegregation must bear the burden of providing the elements of *de jure* segregation as to each and every school or each and every student within the school system." 413 U.S. 189, p. 200. The Supreme Court went on to say that common sense shows that segregative acts have an impact beyond the schools actually acted upon.

However, the Supreme Court did say that if it could be shown that the Park Hill area is separated from the rest of the school district by natural boundaries or geographic structures to such an extent that no other schools in the district would be affected by the segregative actions directed at the Park Hill schools, then that would preclude an automatic finding that there was a dual system. Absent such a finding of sufficient separateness there would be a dual system and an affirmative duty to eliminate all vestiges of the state-imposed segregation would

arise. The same duty arises whether the segregative state action is compelled or authorized by statute or whether it is the result of segregative feeder plans, segregative school site locations, etc. The district court was to determine whether or not there was a sufficient degree of separateness between Park Hill area and the rest of the school district.

2. Even if the Park Hill area is sufficiently separated from the rest of the district so as to not warrant a finding that the whole system is a dual system, the finding of segregative intent in regard to the Park Hill area can serve a purpose for the plaintiff in regard to the core city schools. The school board argued that while there may have been segregative intent in regard to the Park Hill area which resulted in segregated schools, that intent should not be projected to other areas of the district and that is especially true with regard to the core city area because any segregation there was merely the fortuitous result of a racially neutral "neighborhood school policy." The Supreme Court responded by saying: "Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system." 413 U.S. 189, 207 93 S.Ct. 2697.

... we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. . . . This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. . . . [The differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is purpose or intent to segregate. 413 U.S. 189, 208 93 S.Ct. 2686, 2697.

This presumption in which the Supreme Court engaged established a *prima facie* case of unlawful segregative intent; when it is shown that there has been intentional segregation in a meaningful portion of the district, burden of explaining the actions or conditions fall upon the school board. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions 413 U.S. 189, 211 93 S.Ct. 2686, 2698.

Thus, if respondent school board cannot disapprove segregative intent, it can rebut the *prima facie* case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools. 413 U.S. 189, 212 93 S.Ct. 2686, 2699.

In concluding, the Supreme Court said that it was not considering whether the "neighborhood school policy" in and of itself would justify racial or ethnic concentrations. In this case, the mere assertion of such a policy would not suffice because of the presence of segregative intent in a meaningful portion of the school system. The presence of

such intent raises the possibility of some manipulation of the neighborhood school policy, therefore the school board will be required to explain the existence of segregated schools within the school district.

Concurring Opinion of Justice Douglas:

Douglas agrees with Powell's opinion that the *de jure/de facto* distinction should be eliminated in regard to equal protection and school desegregation.

Concurring Opinion of Justice Powell:

Powell first traced the development of the desegregation cases from *Brown*, with its negative directive to refrain from discrimination, through *Green*, which imposed an affirmative duty to desegregate schools in a rural setting, and to *Swann*, which extended the *Green* duty to schools in an urban setting. Powell recognized that the *de jure/de facto* distinction was talked about in these cases but did not believe that that distinction was the basis of those decisions. The basis of this belief was that the remedies which were implemented dealt with segregation in schools "... which in large part did not result from historic state-imposed *de jure* segregation" (p. 222). Furthermore, "Swann imposed obligations on southern school districts to eliminate conditions which are not regionally unique, but are similar both in origin and effect to conditions in the rest of the country" (p. 223). In other words, the Supreme Court had been concerned with something more than the problem of *de jure* segregation. It had been concerned with other aspects of segregation, and in order to continue this trend, the *de jure/de facto* distinction should be eliminated.

Powell saw several problems with the continued use of the *de jure/de facto* distinction as formulated by the pluralistic opinion. The major problems were:

1. The elements of segregative intent on the part of school board are difficult to prove, susceptible to an endless number of factors, and can lead to uneven and unpredictable results in desegregation cases.
2. Past decisions had extended remedies far beyond those remedies necessary to correct segregation caused by state law, therefore limiting relief only to those types of situations (i.e. *de jure* segregation) has no justifiable or principled basis.
3. The different standards for northern and southern schools could cause inter-sectional problems. Powell would like to abandon the *de jure/de facto* distinction in favor of a uniform constitutional approach to the national problem of school segregation. He would require that once a state has assumed the responsibility for education then local schools boards would have to operate integrated school systems within their respective districts. This would mean that once segregation is shown then the school board would have the burden of showing that there was truly an integrated system. Powell also said that it would be possible to have an integrated system even in the presence of one or two segregated schools. The systems should be evaluated on a broader basis.

Finally, on the issue of remedies, Powell said that busing is not a constitutional duty, that perfect integration need not be achieved, and that it is up to the courts, in utilizing

their equitable discretion, to consider the various factors involved when formulating a remedy. The main factors to consider are: (1) the obligation to desegregate, and (2) various public and private interests, including neighborhood school policy, cost of desegregation, safety, etc. Zoning, school site selection, and so forth, are some of the devices which can be used instead of busing, and which may be capable of producing adequate relief.

Dissenting Opinion of Justice Rehnquist:

Rehnquist disagreed with two major aspects of the decision:

1. The court extended the scope of *de jure* segregation to include actions of a school board and then construed those actions in such a manner so as to allow a whole school system to be labeled as "dual" merely because of those isolated actions. Rehnquist believes this is an unwarranted and desirable extension of the past desegregation cases.
2. The enunciation of certain evidentiary rules which would tend to make plaintiffs' case easier to prove are likewise unwarranted and undesirable.

Further Action:

368 F. Supp. 207 (D. Colorado: 12/11/73)

After the Supreme Court decision the district court held another hearing for the purpose of determining whether or not there was a dual system in Denver. The district court decided:

1. That there was not sufficient separation of the Park Hill area from the rest of the school system. This was conceded by the school board.
2. That the policy of deliberate racial segregation in regard to the Park Hill area was sufficient to support the decision that the whole school system was being operated as a dual system. Two factors were important to this determination:
 - a. The segregation of the Park Hill schools was shown to have effects on the rest of the district
 - b. The school board did not present sufficient evidence to rebut the presumption which the Supreme Court said arose when segregative intent was shown in a substantial portion of the district.

The district court did not decide the question of whether there was segregative intent as to the core city area. Such a finding was deemed unnecessary in light of the finding of a dual system on the above mentioned grounds. The district court concluded that the Denver school system was a dual system with the Supreme Court's definition and that there arose an affirmative duty to correct the situation.

380 F. Supp. 673 (D. Colorado: 7/8/74)

After the district court made the decision that there was a dual system being operated in Denver, it gave both sides an opportunity to submit an appropriate desegregation plan. After unacceptable plans from both sides, the district court reviewed one more plan which was unacceptable. The plaintiff's plan was unacceptable because it involved too much busing. The school board's plan was unacceptable because it did not eliminate the segregation.

Because neither side came up with an appropriate plan the district court found itself forced to act. Relying on the

Swann decision, the district court decided that it had the power to formulate a remedy. The district court adopted a plan formulated by Dr. John A. Finger. The details of that plan can be found at 380 FS 673, 688-730.

521 F.2d 465 (10th Circuit Ct. Ap.: 8/11/75)

The court of appeals reviewed the findings and the remedy of the district court. It affirmed the holding of the district court that there was a dual system being operated in Denver. It did not agree totally with the remedy devised and made some modifications thereto. The modifications included increasing the ratio of integration at some schools and eliminating court ordered bilingual of minority students. This decision was appealed to the Supreme Court. Certiorari was denied at 965 CT 806 on January 12, 1976.

Connected Case

Garcia v. Board of Education School District No. 1
573 F.2d 676 (10th Cir: 4/6/78)

Members of a minority group sought to stop the desegregation of their neighborhood school which was predominantly Hispanic. The district court denied relief and the court here affirmed stating that the interest of neighborhood schools were "vigorously presented in litigation by various parties." Such interest was deemed to have been sufficiently protected; therefore there was no need to reopen this issue at this time.

Selected Law Review Articles

1. "Supreme Court Report", Roland L. Young, 59 *American Bar Association Journal* 1040 (Sept., 1973).

Brief summation of the Supreme Court's decision in *Keyes*. It capsulizes the majority opinion written by Justice Brennan, the concurring opinions of Justice Douglas and Justice Powell, and the dissenting opinion of Justice Rehnquist.

2. "Keyes, the Key to National Desegregation?", Beth Schaffer, 3 *Capital University Law Review* 105 (1974).

Brief review of the *Keyes* decision. This writer sees *Keyes* as the first step in expanding *Brown* to the whole country. This writer is encouraged by the decision and believes that the Supreme Court is leaning toward the elimination of the *de jure/de facto* distinction and is becoming more concerned with the elimination or correction of the harmful effects of segregation, no matter how that segregation arises. The writer did realize that the Supreme Court had retained the *de jure/de facto* language but felt that the distinction between the two had become so slight so as to be almost undetectable.

3. "Keyes v. School District No. 1", Andrew L. Blair, Jr. and Lawrence J. MacDonnell, 48 *Denver Law Journal* 417 (1972).

This article was written after the Supreme Court had granted certiorari but before any decision was rendered. It is an attempt to explore the possible paths which the Supreme Court might take and to offer a suggested or preferred alternative.

4. "Constitutional Law—School Desegregation—Constitutional Duty to Desegregate De Facto Segregation", Douglas Lewis Abramson, 23 *Emory Law Journal* 293 (Winter, 1974).

This article capsulizes the development of desegregation cases from *Brown* through *Keyes*. The writer believes that the Supreme Court was gradually moving toward a result-oriented approach to desegregation cases but the *Keyes* decision was a departure from that trend. The writer would like to see the result-oriented approach continued and realizes that this would probable necessitate the abandonment of the *de jure/de facto* distinction. The *Keyes* decision is seen a "a solution that can only lead to further controversy and time consuming litigation" (p. 310-11).

5. "Keyes v. School District No. 1: Unlocking the Northern Schoolhouse Doors", John W. Hanley, Jr., 9 *Harvard Civil Rights—Civil Liberties Law Review* 124 (Jan., 1974).

The writer first summarizes the *Keyes* decision. He then raises two criticisms of the majority decision.

The Supreme Court argued that the segregation of schools had a direct and an indirect impact. The direct impact relates to the schools and students actually effected by the segregation. The indirect impact relates to the long term effects on the racial makeup of a particular area. The writer presented some evidence to show that this indirect impact was rather negligible. The writer argues that to the extent that the Supreme Court relied on this indirect impact argument, it was basing its decision on rather suspect grounds. Even though the writer believes that the decision may be at least partially based on suspect grounds, he still believes that the ordering of district-wide desegregation is probably a desirable practice.

The writer's second criticism arises due to the presumption of segregative intent which results from a finding of a segregated portion of the district, even if that portion is shown to be separable from the rest of the district. The presumption is difficult, if not impossible, for the school board to rebut. Furthermore the Supreme Court will not allow the consideration of such relevant factors as remoteness in time between segregative actions and the present or the change in personnel on the school board.

The writer then reviews Powell's opinion and observes that while Powell's approach is commendable, it seems as if Powell has not attempted to support his approach in any solid constitutional basis. The writer proposes some possible constitutional bases for Powell's opinion.

The writer speculates as to the impact of *Keyes* in other northern cities. He sees two possible stumbling blocks to widespread utilization of *Keyes*.

1. The courts may be hesitant in finding *de jure* segregation where there has been no statute imposing segregation. With this predisposition the requirement that segregative intent be demonstrated may prove to be insurmountable. This is particularly true in view of the fact that the Supreme Court has not said what must be shown to demonstrate segregative intent. Must actual awareness be shown or will the school board be held accountable for the reasonable foreseeable consequences of their acts or will some other standard be used?
2. It is not clear what portion of the school district is required to constitute a meaningful portion. The Supreme Court has set no standards in this regard. Finally the writer observes that the language of the decision may lead to the finding that if a state board of

education has been found guilty of illegal segregative acts then the court may be able to order state-wide desegregation.

6. "Keyes v. School District No. 1: Desegregation in the Northern Cities", Robert Onofry, 9 *New England Law Review* 341 (1974).

The writer first traces the history of desegregation cases from *Brown* through *Green* and up to the *Keyes* decision. The writer argues that the element of intent to segregate was not clearly present in those earlier cases. For example, the writer argues that the affirmative duty imposed by *Green* implies a similar duty no matter what the source of discrimination was. The writer emphasizes that a neutral student assignment plan will not be sufficient once a dual system has been found. The writer says that there is now a bifurcated approach to desegregation cases; an intent to segregate test is used in northern cases and an effect test is used in southern cases. This may cause sectional disharmony since intent to segregate is so difficult to prove that the end result may be very little desegregation in the northern cities.

The writer preferred Powell's approach but saw three possible problems with it.

1. Powell's approach may produce different outcomes in desegregation cases.
 2. Powell's approach may be difficult to apply to real life situations.
 3. Powell's approach may lead to absurd results such as forcing a homogeneous district to integrate.
7. "Constitutional Law—School Desegregation—De Facto Hangs On", Jack Goodman, 52 *North Carolina Law Review* 341 (Winter, 1974).

This is a brief review of the *Keyes* decision in which the writer points out some of the major problems with the decision. The main problems include:

1. The continuance of a dual standard for reviewing school segregation; a strict standard for the South and a more relaxed standard for the North.
2. The use of "intent to segregate" as an element of plaintiffs' burden of proof because intent is difficult to prove in any case.
3. The possibility of uneven application of desegregation orders; the application depending on the decision of the district courts.

San Antonio Independent School District v. Rodriguez 411 U.S. 1 (1973).

This suit was brought as a class action suit on behalf of school children said to be members of poor families who resided in school districts having a low property tax base. Plaintiffs claimed that the Texas system's reliance on local property taxation favored the more affluent and violated equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures, which resulted primarily from differences in the value of assessable property among the districts.

The district court found that "wealth" was a suspect classification and that "education" was a fundamental right

4. The *Keyes* decision may have a tendency to prolong litigation therefore discouraging potential plaintiffs and reducing the possibility of desegregation.

Like most of the other commentators, this writer favors the approach proposed by Justice Powell.

8. "Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case", 45 *University of Colorado Law Review* 457 (Summer, 1974).

The article is an examination of the desegregation cases from *Brown* to *Keyes* and a critique of the *Keyes* decision. The primary problem with the *Keyes* decision, according to this writer, is the continued use of the *de jure/de facto* distinction. If *de jure* segregation was truly the evil sought to be eradicated in the *Green* and *Swann* decisions, then a much more limited remedy than that which was promulgated by those cases would have been sufficient to correct the problem. The fact that such extensive remedies were used, argues the writer, tends to demonstrate that the Supreme Court was concerned with an evil larger than mere *de jure* segregation. The writer believes that this broader concern may have been the harmful effects caused by any segregation and that the continued use of the *de jure/de facto* distinction can do little but cause confusion in this area.

The writer analyzes the decisions of the lower courts in the *Keyes* case and observes that although the district court was trying to find some theory on which to grant relief, the "separate but equal" doctrine could not be sufficient because it had been effectively nullified in the area of school desegregation by the *Brown* decisions. This writer also favors the approach of Justice Powell and he sees that approach as being more consistent with the rest of the desegregation cases.

In conclusion the writer presents the argument that requiring plaintiffs to show a specific intent in order to gain relief is totally inconsistent with the Fourteenth Amendment. The writer argues that the Supreme Court has not required a showing of specific intent in protecting other rights under the Fourteenth Amendment and that such a requirement should be eliminated in school desegregation cases in order to make Fourteenth Amendment protection of Equal Educational Opportunity consistent with the protection of those other rights.

and therefore concluded that the Texas public schools' financing system, whereby there was state and local participation, could be upheld only upon a showing that there was a compelling state interest for the system. The district court held that the test was not met and ruled in favor of the plaintiffs. The district court also concluded that the defendants failed to demonstrate a rationale or reasonable basis for the state's system. In essence, the district court held that the Texas school finance system was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The case was appealed to the U.S. Supreme Court.

The school finance system in question called for state and local contributions to a fund earmarked specifically for teachers' salaries, operating expenses, and transportation costs. The state financed 80% of the funds from its general revenues while the school districts, as a unit, were responsible for the remaining 20%. The school district's share was known as the "local fund assignment" and was apportioned among the various school districts under a formula designed to reflect each district's relative taxpaying ability. The procedure for assigning funds first divided the funds among Texas' 254 counties according to an economic index. This index took into account the relative value of each county's contribution to the state's total income from manufacturing, mining, and agricultural activities. The index also considered each county's relative share of all payrolls paid within the state and, to a lesser extent, each county's share of all property in the state. The next step was to have each county's assignment of funds divided among its school districts on the basis of each district's share of assessable property within the county. The final step was to have the districts within each county finance its share of the assignment out of revenues from local property taxation.

Two motives were found for creation of this system. The first motive was to assure that the finance system would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. The second motive was to establish a local fund assignment that would force every school district to contribute to the education of its children, but would not force the district to exhaust any of its resources.

Plaintiffs, Mexican-American parents whose children attended the elementary and secondary schools in the Edgewood Independent School District, Texas, compared their school district to the more affluent districts in San Antonio, Texas. The comparison illustrated the manner in which the dual system of finance operated and also indicated substantial disparities among the various school districts. The Edgewood district was one of seven public school districts in the San Antonio Metropolitan area. It was located in the core-city sector in a residential neighborhood with little commercial or industrial property. The average assessed property value per pupil was \$5,960, the lowest in the metropolitan area; and the median family income of \$4,686 was also the lowest in the area. Approximately 22,000 students were enrolled in its 25 elementary and secondary schools. The equalized tax rate was \$1.05 per \$100 of assessed property and was the highest in the metropolitan area.

Edgewood contributed \$26 to the education of each child for the 1967-68 school year above its local fund assignment for minimum required by the state system. The state contributed \$222 per pupil for a state-local total of \$248. Federal funds added another \$108 for a total of \$356 per pupil.

In Alamo Heights, the most affluent school district in San Antonio, there were six schools having a total enrollment of approximately 5,000 students. Alamo Heights is located in a residential community which is predominantly white. The assessed property value per pupil exceeded \$49,000 and the median family income was \$8,001. For the 1967-68 school year, the local tax rate was \$.85 per \$100 of assessed property which yielded \$333 per pupil over and above its

contribution to the state program. The state contributed \$225 and federal funds contributed \$36 per pupil. In total, the district had \$594 spent per child.

The Supreme Court found that the plaintiffs made no demonstration that the system operated to the peculiar disadvantage of any class fairly definable as indigent, or composed of persons whose incomes were beneath any designated poverty level. The court also found that neither the appellees nor the district court dealt with the questions of whether lack of personal resources occasioned an "absolute deprivation" of the desired benefit, because where wealth is involved as an issue, the Equal Protection Clause did not require absolute equality or equal advantages. Furthermore, there were infinite variables affecting the educational process and no system could assure equal quality of education except in the most relative sense.

The court found that the system of alleged discrimination and the class it defined lacked any of the traditional indices of suspectness. The court considered the Edgewood plaintiffs to consist of a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happened to have less taxable wealth than other districts. The court concluded that the state system did not operate to the peculiar disadvantage of any suspect class.

The court stated that education was not among the explicit rights guaranteed under the Constitution, nor could any basis be found to say it was even implicitly guaranteed. Therefore, the court concluded that no fundamental rights were violated. The court noted in the dicta that even if education was found to have been a fundamental right, there was no showing that the financing system operated to absolutely deprive plaintiffs of an education. The case was reversed.

Selected Law Review Articles

1. "Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court", Larry W. Yackle, 9 *University of Richmond Law Review* 181 (Winter 1975).

This article discussed the judicial position of the majority's opinion in the *Rodriguez* case. The author commented on Justice Powell's position in *Rodriguez* and stated that the Justice rejected the sliding scale model. The author noted that Powell applies a standard of review which falls between the minimum rationality test applied in the past to economic regulation cases and the strict scrutiny standard applied and limited to suspect classification cases and those cases in which a specific constitutional provision is violated.

Powell's approach, an intermediate standard, purports to retain the ordinary presumption in favor of state legislation, yet would not seem to put forth justifications for statutes under constitutional attack. Powell would require the state to articulate the purpose the statute was designed to further and to demonstrate that the statute was rationally related to that objective.

The article discusses the tests used by the court and concludes that under this emerging intermediate model, the outcome of a case depended, not upon the court's selection of a stringent or relaxed standard of review, but upon the court's sense of the fairness of the governmental action under attack. In the author's opinion, only a single standard of judicial review will be

applied, and in every case the court would reach a result only after balancing the competing interests. The Powell model is referred to as a good faith response to the double standard model of judicial review formerly used by the court. The author, however, criticized the application of the equal protection model of Powell in that it potentially leaves judges at large to impose their personal views upon the nation in the guise of constitutional adjudication.

2. "San Antonio Independent School District v. Rodriguez: A Retreat From Equal Protection", Carl F. Noll, *Cleveland State Law Review* 585 (Fall 1973).

The author notes the importance of the fact that the financing system challenged in the Rodriguez case was substantially identical to those in existence in every state but Hawaii at that time. The author feels that the true basis for the Rodriguez decision was the practical consideration that an affirmance of the district court's ruling would have affected public education in virtually every state. It was felt that the majority's reluctance to rule against the system stemmed from the belief that to require change on such a scale would have resulted in unpredictable consequences. In the author's opinion, the majority opinion given by Justice Powell presents an interpretation of the equal protection clause that may have far more serious consequences than those feared by ruling against the system. The author notes that the effect of the decision on the field of education would further delay much-needed reforms in state educational practices.

3. "Local School Taxation Not a Denial of Equal Protection?", Edgar J. Beaudreault, Jr., 9 *New England Law Review* 529 (Spring 74).

The author of this article feels that disparities in the Texas school financing system were real and could not be denied. However, those disparities were felt to be the result of financing education expenditures based upon property valuation. The author is largely concerned with maintaining local control of education through control of education funding, and suggests alternatives to local school property tax financing.

4. "Wealth Discrimination in School Finance", William H. Clune, III, 68 *Northwestern University Law Review* 651 (Fall 1973).

The author feels that a factual basis could be established which would show that "wealth suspectness" similar to that in Rodriguez indicates a substantial problem of distributive justice that will not likely be solved by the political process. The author feels that injury to the children of poor families is an important part of the injustice but that it is not the most important part in school finance systems. The injury to other children should also be given Constitutional significance.

5. "San Antonio Independent School District v. Rodriguez: Chaotic, Unjust—and Constitutional!", David L. Kirp, 2 *Journal of Law and Education* 461.

The article expresses the opinion that prevailing school finance schemes rely heavily on locally raised revenues, and as such, work hardships on those persons living in property poor school districts. He feels that this sort of system should be eliminated and substituted with one that is more equitable and rational.

6. "San Antonio Independent School District v. Rodriguez: A Study of Alternatives Open to State Courts", James M. Mize, 8 *University of San Francisco Law Review* (Fall 1973).

The article assesses the aftermath of the Supreme Court's decision of Rodriguez. The author first discusses what the decision itself reflected explicitly and implicitly. For instance, the article points out that the court in Rodriguez did not say that poverty could "not" be a suspect class, but merely that the classes the plaintiffs presented were not acceptable. It was also pointed out that the court implied that if the plaintiffs could have shown that the Texas finance system provided "inadequate" education to a certain class, this might have been a severe enough deprivation to evoke the strict judicial scrutiny of the compelling state interest test.

The article then states and discusses several options open to state court's review of their respective public school financing systems. First, the courts could ignore Rodriguez guidelines and look to the state's Constitution and find no state fundamental right to education despite state constitutional references to education. Second, the courts could adopt a flexible standard approach and say that education was sufficiently "fundamental" and poverty was sufficiently "suspect" such that, taken together, necessitated strict judicial scrutiny. Third, the courts could find that there is a state "fundamental" interest in education based upon the fact that education was mentioned within the Constitution and further find that application of the state "equal protection clause's reference to education required strict judicial scrutiny of the tax system (school finance system)." Finally, courts could find that some qualitative constitutional requirement for the education system, such as "thorough and efficient", or "cherishing", was not being met and apply a strict judicial test for the financing system.

The article points out that the Supreme Court had not extended Rodriguez to the school tax systems themselves. The court recognized the systems' disparities and called for legislative reform in Rodriguez. The article concludes that school tax systems may yet be held unconstitutional on state grounds and by application of one of four alternatives proposed in the article.

Milliken v. Bradley
418 U.S. 717 (1974)

Background: The Detroit School District was an independent district surrounded by 85 suburban school districts of equal independence. The surrounding districts

were predominantly white whereas the Detroit district was between 64-70% black.

In April, 1970 the Detroit Board of Education adopted a plan to desegregate the Detroit system. Even though there was a majority of black students in the system, there were several all-black and all-white schools. In July 1970 the Michigan State Legislature enacted legislation which prevented the implementation of the desegregation plan. The legislation was subsequently declared unconstitutional, *Brodley v. Milliken* 433 F.2d 897 6th Cir. Ct. ap: 1970. Before the desegregation plan could be implemented, a new board of education was elected and the desegregation plan was rescinded. This suit was initiated. Various state and local officials and groups were named as defendants including: Detroit Board of Education, Detroit Superintendent of Schools, Attorney General of Michigan, Michigan Board of Education, Michigan Superintendent of Schools and the Governor of Michigan. The complaint alleged that the Detroit schools were being operated on a segregated basis and that the named defendants were responsible. The district court found that the Detroit schools were being operated on a segregated basis and that both the state and local officials were responsible for certain unconstitutional practices which resulted in the segregated system. The unconstitutional practices which the local officials were responsible for included:

1. The creation and alteration of certain attendance zone lines which aided the segregation of students.
2. The use of a feeder plan in such a manner so as to aid segregation.
3. The building of new schools and the maintaining of other schools in such a manner so as to promote segregation.
4. The use or creation of option areas which allowed students to transfer from schools where they were of the minority race.

The unconstitutional practices for which the State of Michigan was responsible included:

1. The acts of the local officials which were imputed to the state.
2. The legislation of July 1970 which was later declared unconstitutional.
3. The approval of school construction by the State Board of Education allowed for segregative locations to be chosen.
4. Denial of transportation allowance, which was granted elsewhere, locked the Detroit system into a "neighborhood school" system.
5. The cross-district busing of black students to a Detroit school from one suburban school district had the express or tacit approval of the State Board of Education. 338 F. Supp 582 (E.D. Mich, 1971).

The district court ordered the Detroit Board of Education to formulate a Detroit-only remedy and the state to devise a broader remedy, one that would involve the surrounding school districts. The surrounding districts were allowed to intervene in this case but only to advise on the desirability and legality of the proposed desegregation plans. The intervenors were not allowed to raise any claims or defenses on any issue which had previously been decided. The district court held that a Detroit-only desegregation plan would not be adequate because such a plan would tend to

make the Detroit School District even more identifiably black.

After considering various arguments for and against a multi-district remedy, the district court concluded that 53 of the surrounding school districts should be included in a desegregation plan. "School district lines are simply a matter of political convenience which may not be used to deny constitutional rights" 418 U.S. 717, 733. Furthermore, the district court said that the goal of any desegregation plan for Detroit would be to "achieve the greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom (would be) substantially disproportionate to the overall pupil racial composition" 345 F. Supp 914, 918.

While a desegregation plan within the district court's guidelines was being formulated, the district court ordered that an interim plan be implemented. In order to implement the specific plan, the district court ordered the Detroit Board of Education to purchase 295 additional school buses.

On appeal, the Sixth Circuit Court of Appeals affirmed the decision of the district court except as to the order directing the purchase of new buses. 484 F.2d 215 (6th Cir, 1973). The decision of the Court of Appeals can be summarized as follows:

1. The findings and conclusions of the district court that there were constitutional violations committed by the Detroit Board of Education and by the state defendants were supported by the record and did not require reversal.
2. A Detroit-only remedy would not be sufficient and multi-district relief was the only feasible plan. Such relief would be proper because of the violations attributable to the state defendants and because the state has the power to control the local school districts.
3. The ordering of a multi-district remedy involving 53 of the surrounding school districts was within the equitable power of the district court.
4. All of the surrounding school districts should be given an opportunity to be heard with regard to the scope and implementation of a remedy. This opportunity should not be limited to the 53 districts directly involved because all the districts are likely to be affected.
5. The order pertaining to the school buses should be vacated; it would be subject to reimposition at an appropriate time. 484 F.2d 215 (6th Cir, 1973).

Court Ruling: The Supreme Court reversed and remanded. The court limited its review to the remedy proposed by the district court. The Supreme Court was willing to presume that there was segregation in the Detroit school system and that the Detroit Board of Education and the State of Michigan were responsible for that unlawful segregation. However, the court found the multi-district remedy of the district court was improper.

A cross district remedy will be allowed if there is a showing that the "racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation." 418 U.S. at 745. There must be an interdistrict violation with interdistrict effect before there is a constitutional wrong calling for interdistrict relief.

The Supreme Court first reviewed the decisions of the lower courts in this case. It then reviewed the past decisions of the Supreme Court regarding school desegregation. The court observed that the *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1 (1971) decision requires that the scope of the remedy be related to the nature of the constitutional violation. In this case the violation was a segregated Detroit School District. The district court expressly recognized the limited scope of the violation, but nevertheless proceeded to order a remedy which was not limited to the Detroit district. The Supreme Court found that the remedy was too broad in that it did not comport with the scope of the violation.

The Supreme Court pointed out that the *Swann* decision does not require the attainment of a particular racial ratio in every school in the district. *Swann* merely requires a desegregated system. The district court's order "to achieve the greatest degree of actual desegregation" did not follow this standard; therefore it was improper.

The court then isolated the major new issue raised by this case. The issue was when and to what extent a court can order an interdistrict remedy to correct a segregation problem. The court settled on the rule stated above and went on to explain the rule:

Thus, an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts cause racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race 418 U.S. at 745.

The Supreme Court said that the constitutional right of students in this situation only involves the right to attend school in a district which does not segregate its students on the basis of race. The decision of the district court would be an expansion of this right.

The Supreme Court also said that the district court was wrong in assuming that school district lines are drawn merely "for political convenience." The notion of local control over schools is a pervasive aspect of the American educational system. The proposed remedy would destroy this local control and would create a huge super school district which would present many logistical problems. In addition it may force the district court into a position of being the ultimate administrator of that district.

In conclusion, the Supreme Court said that the record in this case did not show any possible interdistrict violations except for the one incident involving the busing of black students of a suburban district to a black Detroit school. The nature of that violation could not support the extensive remedy ordered by the district court. The Supreme Court then addressed the remaining actions for which the district court held the state responsible. The Supreme Court found each action to be an insufficient basis on which to order cross district relief. Most, if not all, of the evidence in this case involved the segregation of the Detroit district only. There was no showing of cross district violation or cross district effect; therefore, there could be no cross district remedy.

Concurring Opinion of Justice Stewart:

Basically, Justice Stewart asserts that the district court has overreached its equity powers by imposing a remedy

which affects the constitutionally administered school districts surrounding Detroit. Justice Stewart says that this case was not dealing with substantive constitutional law; rather, it was dealing with the scope of federal equity jurisdiction.

Justice Stewart also points out that interdistrict relief may be proper in a different factual setting such as where state officials draw district lines to promote racial segregation.

Dissenting Opinion of Justice Douglas:

Douglas believes the state had primary control over the schools of Michigan and that there was not that much local control. Because of this situation the state is responsible for the unlawful segregation within Detroit and it should be compelled to use its resources in correcting the violation. Those resources should include the formulation of an interdistrict remedy.

Douglas also points out that without the interdistrict remedy, the Detroit School District will become virtually all black. When this result is coupled with the *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), decision (which allowed for rather large disparities in expenditures between school districts) it appears that the Supreme Court is creating a condition of separate but unequal schools in the larger cities of this country.

Finally, Douglas reiterates his position that the *de jure/de facto* distinction should be eliminated. He believes that the courts should concentrate on correcting the undesirable effects of segregation regardless of the cause. This approach would clear the way for interdistrict relief in this situation.

Dissenting Opinion of Justice White (joined by Justices Douglas, Brennan, and Marshall):

White believes that the remedy proposed by the district court would be feasible and that it would probably be easier to implement than an intradistrict remedy. The record shows that the state was responsible, in part, for the segregation and it should have some role to play in the remedy. The federal courts should have the power to effectively correct constitutional violations and that power should include the ability to order the state to do certain acts. The states should not be allowed to resist corrective measures by hiding behind certain well-placed boundary lines.

Dissenting Opinion of Justice Marshall (joined by Justices Douglas, Brennan and White):

Marshall states that once state-imposed segregation has been shown then there is a duty on the state to eliminate all vestiges of segregation and to achieve the greatest possible degree of actual desegregation. The majority seems to adhere to this rule, but only to the extent that district lines are not crossed. Marshall can find no basis for allowing district lines to act as barriers to effective constitutional remedies.

The majority ignores two facts: the state is responsible for the segregation of Detroit schools and that without an inter-district remedy, the Detroit School District would become all black. If such factors were considered it would be apparent that an interdistrict remedy would be the only effective remedy.

Marshall sees this decision as a "giant leap backward" after years of taking small steps forward in the area of school

desegregation. He believes that this decision will render the federal courts powerless to correct constitutional violations in this area in a meaningful way.

Further Action:

District Court: On remand the district court approved a Detroit-only desegregation plan. The plan contained the usual aspects of desegregation such as pupil reassignment and busing, and certain educational components. Most of the educational components were accepted by the local and state authorities but four of the components were challenged by the State Board of Education. They were: (1) in-service teacher training (2) remedial reading programs; (3) changes in the testing practices; and (4) counseling and career guidance.

The state did not think that these were appropriate features of a desegregation plan. The district court held that these were properly included as part of the remedy and ordered the state to share in the cost of implementing these programs.

Court of Appeals: The State Board of Education appealed the decision of the district court but the local school board did not appeal. The court of appeals affirmed the decision of the district court. 540 F.2d 222 (6th Cir. 1976).

Supreme Court: The Supreme Court also affirmed the decision of the district court. *Milliken v. Bradley* 433 U.S. 267 (1977) (*Milliken II*).

Opinion: The Supreme Court addressed the issue of whether a federal court could order remedial educational programs as part of a school desegregation decree. The court observed that it had not previously decided this issue and turned to other decisions to try to ascertain an appropriate rule. The court set out three factors which must be weighed in order to determine the propriety of a proposed remedy. Those factors are:

1. The remedy must "be related to the condition alleged to offend the Constitution."
2. The remedy must "be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."
3. The court must consider the interests of state and local authorities 43 U.S. (p. 280).

The state argued that the remedy exceeded the scope of the violation. The state based its argument on the Supreme Court's decision in *Milliken I*. The court held here that the state had misapplied the *Milliken I* decision. The proper view is that a remedy exceeds the scope of the violation when it is "aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . , or if they are imposed upon governmental units that were neither involved in nor effected by the constitutional violation" 433 U.S. (p. 282). The court went on to say that "the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition' which offends the Constitution". In other words, because the constitutional violation contributes to or causes the academic differentiations, the remedy must be such so as to correct that condition.

The court outlined several lower court decisions which called for remedial programs. The court cautioned that such remedies must be evaluated on a case by case basis and declined to give its blanket approval of such remedies. In this case, the record supports the district court's conclusion that remedial programs are necessary to ensure that the condition of segregation is properly remedied. The court noted the extensive evidence on this issue and was therefore in a position to make an informed decision.

The court also outlines some of its own decisions which have allowed more extensive remedies than mere student reassignment. These cases including the present case, demonstrate that the federal courts have broad discretion in formulating a remedy.

Selected Law Review Articles:

1. "1 Journal of Law and Education 130 (1972) Recent Decisions,"

This article summarizes the decision of the district court in *Milliken I*. The court of appeals had not yet acted. The writer believes that the district court's decision had promising potential for plaintiffs in desegregation suits.

2. "Segregative Intent and the Single Government Entity in School Desegregation," 1973 *Duke Law Journal* 1111 (1973).

The article was written after the court of appeals rendered its decision in *Milliken I* but before the Supreme Court had acted. The writer compares *Milliken I* to *Bradley v. Richmond School Board*, 462 F.2d 1058 (4th Cir. 1972); aff'd by equally divided court 93 S. CT. 1952 (1973). In *Richmond* the Fourth Circuit Court of Appeals refused to allow an interdistrict desegregation plan, while in *Milliken I* such a plan was allowed by the Sixth Circuit. The writer explains this difference by emphasizing the nature of the controlling bodies in each case. In *Richmond* the local school districts had a great deal of independence while in *Milliken I* the state-wide school board exercised considerable more control over the local boards. This control in *Milliken I* provided a sufficient basis for the courts to order the interdistrict remedy.

3. "Metropolitan Desegregation: Buttressing the Barrier of *Milliken v. Bradley*," Dorothea W. Regal, 43 *Brooklyn Law Review* 507 (Winter, 1977).

This article is primarily a review of the *Hills v. Gautreaux* decision. *Hills* involved a charge of segregation in the area of public housing. The Supreme Court ordered the Department of Health, Education and Welfare to stop giving funds which were to be used to foster segregated housing by the Chicago Housing Authority. The court's decision was based on its control over federal agencies and it did not order desegregation. At first glance the *Hills* decision may seem to be a relaxation of the rigid stance taken in *Milliken I*, but upon closer examination there was really no change and the Supreme Court continued its retreat from ordering desegregation.

4. "Milliken v. Bradley: Turning the Buses Around," Levon G. King and Marsha M. Woods, 1975 *Detroit College of Law Review* 125 (1975).

The writers summarize the various decisions rendered in the *Milliken I* case including the decisions of the district court, the court of appeals and the Supreme Court. Then they review the previous desegregation cases of the Supreme Court and analyze the *Milliken I* decision. The key points of this analysis include:

- a. The decision was probably an attempt to limit desegregation in the North and prevent the erosion of desegregation in the South. The decision is more understandable if one approaches it from this standpoint than if one tries to apply the settled principles of desegregation law to it.
 - b. The Supreme Court had reinterpreted *Swann* relating to how the remedy should relate to the scope of the violation. *Swann* broadened the equity power of the federal courts but in *Milliken I* the same words are used to limit that power.
 - c. The court ignored the district court's finding that Detroit-only desegregation would be constitutionally inadequate, in requiring a cross district violation before a cross district remedy would be allowed. The court did not consider the practical aspects of the situation even though it had done so in others.
 - d. Desegregation in northern schools may involve more than the educational system or busing: the opposition to it may have its roots in the perpetuation of the status quo, i.e., the maintaining of a lower class of less educated, minority people. "The stubborn political opposition of many whites signals a deep emotional and financial investment in the status quo." 1975 Det. C. L.R. (p. 142).
 - e. At a time when the South has achieved much desegregation the writers see the Supreme Court as switching to an approach to desegregation similar to the approach proposed by Powell in the *Keyes* case, i.e. requiring the operation of "a genuinely integrated school system." Such an approach would make for a uniform standard but would not require any affirmative acts to eliminate actual segregation in situations like *Milliken I*.
 - f. The writers point out that Douglas' warning, that separate but unequal school systems may result from recent Supreme Court decisions, may indeed have considerable merit.
5. "Commentary: *Milliken v. Bradley*—The 1974 Decision," 4 *Journal of Law and Education* 1973 (Jan., 1975).

The commentary starts out by reprinting the majority opinion and the concurring opinion of Justice Stewart. The opinions are followed by a series of articles related to the decision. Those articles are summarized as follows:

- a. "School Integration Fight Hardens in the North," by William E. Farrell.
This article was written before the Supreme Court's decision but points out some of the problems connected with school desegregation in the North. Problems such as white flight, political resistance and refusal of school boards to desegregate voluntarily all contribute to a situation where in some northern cities there is more segregation now than ever before.
- b. "Busing is Stopped at the City Line," John Matthews, Education Reporter, Washington Star-News. Brief review of the *Milliken I* decision. The writer believes that the decision will result in two separate

and unequal school systems within metropolitan areas; the urban black district and the suburban white districts(s). This is seen a refusal to take the next step toward the desegregation of the major urban centers of the North. The writer believes that it is still possible to get an interdistrict remedy but the burden on the plaintiffs in such cases has been greatly increased.

- c. "An Anti-Black Strategy and the Supreme Court," Nathaniel R. Jones, General Counsel NAACP.
A very strong, almost militant, condemnation of the *Milliken I* decision. The writer believes that this decision is the natural or expected result of the "diabolical, anti-black strategy" practiced by the Nixon Administration. The author notes that the four Justices comprising the plurality opinion were all Nixon appointees, and the decision could signal the commencement of a separation of the races in a manner similar to apartheid. This is especially true because the main opposition seems to be directed at two way busing which indicates that white people think that whites are more worthy than black.
- d. "Milliken v. Bradley in Perspective," Martin E. Stone, General Counsel, National Committee Against Discrimination in Housing, Inc.
The writer sees the *Milliken I* decision not as a regression from previous decisions but as a failure to take the next step in desegregation cases. If *Milliken I* was decided in favor of plaintiff it would have eased the burden of proof required of plaintiff and probably would have triggered extensive desegregation in the northern cities. But even considering the way *Milliken I* was decided, the future of desegregation cases is not totally clear. The writer sees two possible alternative approaches:

1. If Chief Justice Burger's opinion is read literally then plaintiff must show that local school officials were responsible for the unlawful segregation of an inter-district magnitude. This would be almost impossible to show because school officials rarely have any impact on inter-district issues.
2. If Justice Stewart's opinion is followed, the segregative acts of other officials could satisfy the prerequisites needed for inter-district relief. Acts such as zoning laws, restrictive covenants or refusal to allow public housing may be sufficient to allow for inter-district relief.

Even if Justice Stewart's view prevails, the writer sees several unanswered questions including:

1. How much impact must the officials' segregative acts have on racial patterns in order to satisfy the "any significant measure" test?
2. Would plaintiff have to demonstrate that every school district which they wished to include in a remedy has been guilty of some form of segregative action?

The writer concludes by saying that *Milliken I* was an attempt for a major breakthrough, that it failed, but that desegregation law has not been relegated to

a pre-Brown stage. Plaintiffs will have to work harder but the goal of desegregation can still be attained.

- e. "Running and Busing in Twentieth-Century America," by Derrick A. Bell, Jr., Professor of Law, Harvard University.

A brief summary of the *Milliken I* decision. The writer believes that the burden of proof set forth by the Supreme Court is tolerable and that the prerequisites for inter-district relief can be established without overwhelming effort. But even if the prerequisites are met there are two factors which may weigh heavily in the decision of whether to implement the remedy of cross district busing. Those factors are:

1. The serious and steadily growing opposition to busing by both blacks and whites. While the Supreme Court will probably not admit that it is influenced by public opinion, the court does not operate in a vacuum and it will or should realize that it may not be able to order that which the people are strongly opposed to.
2. There is no clear proof that desegregated schools are better in terms of education or socialization. The writer states that the desegregation advocates may be wise to investigate and formulate alternative remedies instead of relying on busing as a primary goal.

- f. "Are the Courts Abandoning the Cities?," J. Skelly Wright, U.S. Ct. App., D.C. Circuit.

The writer feels that the Supreme Court has retreated from its duty to protect the "discrete and insular minorities." The *Milliken I* and the *San Antonio Independent School Districts v. Rodriguez* 411 U.S. 1 (1973) decisions characterize this retreat. In both cases the Supreme Court seems to be over-emphasizing the importance of local control and at the same time ignoring the intentional segregation. The writer says that the segregation between urban and suburban areas was started by overt intentional actions and has continued by the use of seemingly neutral actions such as zoning ordinances or denial of low level housing permits.

The writer does not think that the courts can cure all the problems related to race relations and does not think that the courts should attempt to do so. However, with decisions such as *Milliken I* the Supreme Court is allowing the segregationists to use the city limits as a barrier between the races.

6. "School Desegregation in the North: A Post-Milliken Strategy for Obtaining Metropolitan Relief," Robert E. Manley, 20 *Saint Louis Law Journal* 585 (1976).

The writer observes that single district desegregation is undesirable in metropolitan areas because it will encourage white flight to the suburbs thereby reducing chances for integration and reducing the tax base for the city schools. The writer believes that multi-district relief is better and that it can be accomplished.

The writer next reviews the history of desegregation cases and observes that "(i)n terms of threshold requirements of plaintiffs' case, the basic distinction between southern and northern desegregation litigation is the burden of proof", 20 *St. Louis L. J.* (p. 591), i.e., the de jure/de facto distinction. However, the writer believes that this distinction has lost most of its significance at least as far as cases involving single district

desegregation is concerned. The writer cites *Keyes v. School District No. 1* in this regard.

The writer next analyzes several post-Milliken I cases which involve multi-district relief. Most of these cases involved southern school districts, i.e., de jure segregation, and multi-district relief was upheld. So the de jure/de facto distinction may be still viable in the area of multi-district relief.

Several factors are listed which may demonstrate the inter-district intent required by *Milliken I*. These factors include: (a) rejection of consolidation proposals by suburban officials or voters; (b) location of public housing; (c) denial of loans to minorities who want to move to suburbs; the continued grant of a charter to the institutions so acting, or the continued deposit of public funds with those institutions which tend to show approval of the segregative actions; (d) exclusionary zoning; and (e) building highways, etc. as buffer zones between urban and suburban areas.

The writer advises that if a strong case for multi-district relief is present then plaintiffs should seek such relief but where a desegregation case will only result in single district relief then plaintiffs may be better off not seeking such relief and thereby avoid the possibility of accelerating adverse effects such as white flight.

8. "Developing Litigation Strategies for Multidistrict Relief: The Legal Consequences and Implications of *Milliken v. Bradley*, on Metropolitan School Desegregation," David A. Smith, II *Urban Law Annual* 187 (1976).

The author first summarizes the *Milliken* decision. He does not agree with Chief Justice Burger's statement that there was no constitutional principle or basis for the granting of an inter-district remedy in this situation. The writer claims that there was at least a basis for granting inter-district relief. This basis can be found in previous decisions which placed an affirmative duty on school districts to desegregate, when held that neutral policies will not always satisfy this affirmative duty, and which allowed the district courts to use their equitable powers to formulate remedies that were effective, even if inconvenient or bizarre.

The writer notes how the *Milliken* decision has slowed or stopped the trend of the Supreme Courts to eliminate or minimize the de jure/de facto distinction and that Chief Justice Burger missed an opportunity to expand the geographical consequences of a finding of de jure segregation. Previous cases have dealt with expanding the scope of the federal equity powers. This was the first case which deals with setting limits on that power. The writer does see hope however in the fact that Stewart's opinion does not shut the door entirely on the possibility of inter-district remedies.

As far as litigation strategies after *Milliken I*, the writer mentions several possibilities, including:

- a. Because Chief Justice Burger seems to have emphasized maintaining local control over schools, perhaps a showing that there is no local control to maintain will effect the decision.
- b. A different statutory makeup of the school systems may be decisive.
- c. A showing that a multi-district remedy would be accomplished with minor difficulties may be influential.

In addition, the writer sees *Milliken I* as possibly working to plaintiff's advantage in that the majority of the

court appears to adopt the following theories on which to base multi-district relief: (a) constitutional violation with inter-district effect, (b) deliberately drawn district lines on the basis of race, and (c) purposeful racial discrimination in state housing or in zoning.

The writer notes that several lower courts have been liberal in finding intent to segregate in multi-district areas, to the extent of allowing segregative effect to satisfy the requirement. This may show that the lower courts will not follow *Milliken* too strictly.

Finally, the writer observes that the metropolitan multi-district desegregation case is the only area where the Supreme Court has retained the *de jure/de facto* distinction in any meaningful degree.

9. 63 *American Bar Association Journal* 1263 (Sept., 1977).

Morgan v. Hennigan
379 F. Supp. 410 (June, 1974)

Background: This is a long and complex school desegregation case in which black parents and their children, who attended Boston public schools, sought relief against acts which allegedly violated the constitutional rights of the children.

The black parents and children were certified by the court as proper representatives of a class consisting of all black children enrolled in the Boston Public School System and their parents (hereinafter called plaintiffs).

The multiple defendants, against whom this action was commenced, consisted of the Boston school committee, its individual members, and the superintendent of the Boston Public Schools (hereinafter called the defendants). The state defendants consisted of the Board of Education of the Commonwealth of Massachusetts, its individual members, and the commissioner of education.

The plaintiffs alleged in that defendants intentionally brought about and maintained racial segregation in the Boston Public Schools by various actions (to be discussed below). Plaintiffs asserted that black school children had been denied the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

The plaintiffs contended that the defendants had engaged in racial discrimination in hiring, promotion, and assignment of faculty and staff. Plaintiffs also asserted that both the state defendants and the defendants implemented pupil classification practices which discriminated against some children in admission to certain Boston schools. Plaintiffs asserted that these practices denied them their constitutional right to equality of educational opportunity under the Fourteenth Amendment.

The defendants denied in general the allegations of the plaintiffs. Defendants also argued that to the extent the schools in the Boston system contained disproportionate numbers of whites and blacks, that result was due to residential segregation over which defendants had no control, and was also due to the neighborhood school policy which defendants claimed was a constitutionally permissible

Brief summary of the *Milliken II* decision where the Supreme Court approved the implementation of remedial education programs as a part of the desegregation remedy of the Detroit school system.

10. 17 *Washburn Law Journal* 425 (Winter, 1978).

Brief summary of the *Milliken II* decision. The writer maintains that this decision is not an extension of past cases but lies within the decision of *Brown II* by applying equitable principles in fashioning a remedy. The remedy was intended to "cur(e) the condition caused by past constitutional violation", 17 *Wash L.J.* at 429, and the remedy did not exceed the scope of the violation; therefore it is proper.

educational policy. The defendants further asserted that they had not promoted segregation, but had tried to effect a better racial balance in the Boston schools pursuant to a unique Massachusetts statute called the Racial Imbalance Act.

Questions of racial segregation in the public schools of Massachusetts have a unique dimension because of this state racial imbalance law passed in 1965. The statute commands affirmative action to eliminate racial imbalance in public school systems whatever its cause. Although the statute is not directly involved in the instant case, it is important and relevant because many of the defendants' actions were taken as a result of this act, and efforts by the defendants to evade the act illuminate their intent to segregate.

The Racial Imbalance Act provides that if the state board finds that non-white students in any public school are in excess of 50% of the total number of students in the school, then the local school committee must file a plan for elimination of such racial imbalance. The state may withhold state funds, or increase them as required to enforce this act.

The theory which defendants advanced was that they were in literal compliance with the act; that there are restrictions in the act as well as in various court decisions which limit the measures local school committees may take in alleviating racial imbalance; and that therefore the defendants had done all they could under the act, making the act itself and the state defendants responsible for racial segregation in Boston.

The court summarily rejected this argument on two grounds:

1. Boston is only now on the threshold of real compliance with the act as a result of numerous state board orders and a series of court rulings on those orders which in total manifest a continued attempt by defendants to delay implementation of a racial balance plan.
2. There is no evidence to support the theory that the defendants were caught in a dilemma of choosing

between the Racial Imbalance Act and the Fourteenth Amendment, and in good faith chose the Racial Imbalance Act.

The court stated that Boston's present racial segregation is hardly the result of the defendants having complied with the act. Indeed, it is just the opposite.

The state defendants also denied any constitutional wrong-doing. They contended that they had frequently made unheeded suggestions to defendants on how to alleviate racial imbalance in Boston schools; that they had limited control over defendants' activities; that by enforcing the Racial Imbalance Act they had done as much as possible to eliminate racial segregation in the Boston public schools. The state defendants did agree, however, with virtually all the allegations made by plaintiffs here against the local defendants.

Before one delves into the conduct of the Boston school committee which the court considered in making its determination, a basic look at the Boston school system is essential. The Boston school system is headed by a five-member school committee elected at large. There is also a board of superintendents. The superintendent is the chief school administrator. The school system is funded through a complicated statutory formula which allows the school committee to appropriate the great bulk of the system's funding. The Commonwealth of Massachusetts traditionally has exercised little authority over the day-to-day operation of local school districts. The role of the State Department of Education with respect to local school systems is providing a communications and information center with specialized services and planning, distribution of federal and state aid, and supervision of the Racial Imbalance Act. However, local officials derive all of their authority from the state, ultimately.

The Boston school system was at one time a system of districts, subdivisions of the city, which funneled students from elementary schools through district junior high schools to district high schools. Boston has also had city-wide schools for many years. These originally fell into two categories: special examination schools (elite schools) and city-wide trade schools.

From this basic organization the Boston school system had evolved into a complex maze of patterns, policies, and types of schools—with various exceptions to all of these—which has completely changed the original district design.

With the exception of special examination schools and trade programs, the moving of students who graduated from one school into the next level was accomplished by feeder patterns. A feeder pattern channels students from one or more schools at one level into one or more schools at another level.

Boston's schools at the middle, junior, and senior high levels now obtain students from large parts of the city. Some students still move through schools as if they were district schools; however, their schools also serve large numbers of students from other parts of the city.

As for elementary schools, the city had a complex maze of single-school and multi-school districts which varied widely in size. The elementary schools cannot be fairly characterized as neighborhood schools because some students walked many blocks to a school when there was

another school closer, but on the other side of that district line. Within multi-school districts, students had a complete option at first as to which elementary school within the district to attend, and often walked past one while enroute to another.

Approximately one-third of Boston's students, a majority of high schoolers, used buses or other public transportation to travel to and from school.

The Boston public school was characterized by heavy concentrations of black pupils in some schools and heavy concentrations of white pupils in other schools. As of the 1971-72 school year, approximately 96,000 students were enrolled in the system, of whom about 59,300 or 61% were white; 30,600 or 32% were black; and 6,500 or 7% were other minorities. This overall ratio was far out of line with the ratio in most of Boston's schools. Eighty-four percent of Boston's white students attended schools that were more than 80% white; 62% of the black students attended schools that were more than 70% black. At least 80% of Boston's schools had racial compositions that were sharply out of line with racial compositions of the Boston school system as a whole. Racial segregation permeated schools in all area of the city, all grade levels, and all types of schools.

Teachers were also segregated. Seventy-five percent of Boston's black teachers were in schools more than 50% black. Eighty-one schools had never had a black teacher.

The Boston Public School System was thus characterized by racial segregation. None of the defendants disputed this fact. The dispute, rather, was how the schools have become and remained that way. The issue to be resolved, therefore, was whether any of the defendants have *intentionally* and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston Public School System in violation of the Fourteenth Amendment.

In looking for intent or purpose to segregate, the court analyzed the defendant's conduct in six principle areas, to be discussed separately as follows:

- I. Facilities utilization and new structures
- II. Districting and redistricting
- III. Feeder patterns
- IV. Open enrollment and controlled transfers
- V. Faculty and staff
- VI. Elite schools and vocational programs

Analysis:

- I. Facilities utilization and new structures
- A. Overcrowding

The court found many overcrowded schools that stood in stark contrast to other facilities at similar grade levels which operated far under capacity. Generally, the overcrowded schools were predominantly white, and the under-utilized schools were predominantly black. Defendants responded to overcrowding at one high school (97% white) by assigning overflow students to another overcrowded, distant, and white high school. There were closer schools with available seats, but these schools were identifiably black. On several occasions defendants did pursue a policy of reducing overcrowding when it would not affect the racial composition of the schools involved. Evidence also

showed that the defendants deliberately dragged their feet in formulating plans to lessen racial imbalance by constantly delaying state requested plans until the last possible moment.

Thus, defendants, although acknowledging the hazards of overcrowding, acted inconsistently on the basis of race of the students being harmed. The following two sections on portable classrooms and new facilities point specifically to affirmative acts of defendants related to overcrowding which the court found intentionally created or maintained racial segregation.

B. Portable classrooms

Portable classrooms are mobile one-classroom buildings which have been used since the 1960's to alleviate the overcrowding of some schools. These portables were used almost entirely to alleviate overcrowding at predominantly white schools when available nonsegregative methods, such as changing district lines and reassigning students, could have achieved the same result. Thus the use of these portables perpetuated the racial concentrations present in both the overcrowded schools and in the schools to which displaced students might have been sent. In addition, superintendent Ohrenberger deemed these portables "educationally undesirable" for use in alleviating segregation, while simultaneously their use for alleviating overcrowding at a 99% white high school was found acceptable.

C. New facilities

The overwhelming effect of most of Boston's new school facilities has been to increase racial segregation. The racial composition of these new facilities when opened was almost always imbalanced. Many of the new facilities which were not subjected to prior state scrutiny (because constructed without state aid) opened identifiably black. The court found through the following specific school openings that defendants were covertly resisting the elimination of racial imbalance and endeavoring to perpetuate racially segregated schools.

1. The Weld School opening

In 1970, in a 98% white neighborhood, the Weld School opened 87% black, 6% other minority, and 7% white. After commencement of this case, Weld School was closed. One hundred and thirty black students were bused to Weld from a 90% black neighborhood a mile and half away allegedly for the purpose of alleviating overcrowding. None of the neighborhood white children (unless handicapped) attended Weld. Defendants argued that the reason for transporting the blacks to Weld was to keep black friendships intact. The court rejected this argument because there was no evidence to show that this reason was considered before busing was undertaken.

2. The Hennigan School opening

This new racially balanced elementary school was proposed in 1967 as part of Boston's plan to

eliminate racial imbalance, and was planned to accommodate students in a nearby black housing project (99% black) as well as white students to be recruited from outside the district. Defendants made no effort to recruit white students for the 1971 opening of one wing. In the following year, 50 whites were recruited, but the entire school opened in 1972 62% black, 13% other minority, and 25% white. The court concluded that since attendance of blacks at Hennigan was mandatory, and since attendance of whites was voluntary, the school's racial segregation upon opening could not have come as a surprise.

3. The Lee School opening

This school was also proposed as a racially balanced school pursuant to Boston's plan to eliminate racial imbalance. The school committee decided to include 350 white pupils attending other schools, but gave them options of staying at their old schools. Faced with a state warning that Lee would open racially imbalanced, the school committee cancelled the option, and then shortly before school opening again enacted the option. The result was chaos on registration opening day and the expected racial imbalance. The court concluded that defendants never intended to take the initiative in seeing that Lee opened racially balanced.

4. New English High School opening

This new ten-story building was designed to accommodate all of Old English's students plus 700 additional students in a proportion to balance the school racially. Old English changed from 20% black in 1967, when New English was planned, to 80% black in 1973. On the eve of its opening the New English building was awarded to Girls Latin High, 89% white. The evidence established that the intent of the Boston school committee in its determination of which of the high schools would occupy the new building (which was in fact designed and equipped specifically to house Old English) was to keep the student body of Old English predominantly black.

II. Districting and Redistricting

Defendants had not made districting changes which brought about increased segregation where there was none before. However, the defendants have made districting changes for the purpose of perpetuating racial segregation. The evidence at trial showed extreme disparities in racial composition of adjacent districts as well as uncompromising resistance by defendants to redistricting when it would have reduced racial segregation. Despite intense pressure from private groups and from state and federal agencies, including the withholding of millions of dollars in state and federal assistance,* the defendants defeated or evaded successive redistricting proposals for the purpose of perpetuating the existing segregated school system.

The evidence also established that racial segregation of elementary students in the Boston school system was facilitated by the existence of multiple schools within a single district.

On August 23, 1971, defendants, under mounting pressure, submitted a comprehensive plan to the state for revision of district lines and for overall comprehensive racial balance. A Citizens Advisory Committee was to be established to review districting, half the members selected by the state, and half by the defendants. Defendants then proceeded to sabotage the comprehensive plan. To membership on the advisory committee defendants appointed persons known to be vehemently opposed to redistricting, and encouraged them to stalemate discussions. Further, a representative committee of distinguished citizens to oversee the entire operation was never appointed as proposed by defendants. Data was also withheld from state officials who sought to offer technical advice to the Boston school committee.

These tactics in total reflect upon the true intent of defendants.

III. Feeder Patterns

Enrollment in high school was determined by a combination of seat assignments, preferences, and options collectively called feeder patterns. Boston utilized a complicated system of feeding students to high schools from various intermediate schools based on certain criteria. These criteria were promulgated by the superintendent each year.

The court found after analysis of large amounts of statistics and data that the only basis for the feeder pattern criteria was the racial factor. Neither distances between schools, capacities of receiving schools, means of transportation, or natural boundaries explained them. The consequence of the feeder pattern, well understood by defendants, was a dual system of education—one for each race. Black students generally entered grade 9-through-12 high schools after completing eighth grade in an eight-grade middle-level feeder school, and white students generally entered grade 10-through-12 high schools after completing ninth grade in a nine-grade middle-level feeder school.

IV. Open Enrollment and Controlled Transfer

These terms refer to school committee policies which permit pupils (if space is available) to enroll in, or transfer to schools outside their district or feeder pattern. On August 23, 1971, defendants (under state pressure) finally agreed to prohibit transfers of students which would increase racial imbalance. Defendant's prohibition was more apparent than real, however. There were a number of self-fashioned exceptions to the new transfer prohibition. One exception was

administered merely as a loophole and was explicitly referred to by defendants as an "escape clause" or a "big out". The result of defendant's maneuvering with respect to these exceptions was white abandonment of schools which appeared to be in the process of becoming predominantly non-white. The court thus found that the open enrollment and controlled transfer policies were managed under the direction of the defendants with a singular intention to discriminate on the basis of race.

V. Faculty and Staff

Plaintiff's first allegation under this heading was that the defendant's policies regarding faculty and staff resulted in predominantly black schools being staffed with less qualified and less experienced teachers and with ever-changing faculties, all to the detriment of black pupils who were receiving an education unequal to that being given to white pupils. Evidence showed that black teachers and black administrators were segregated in black schools, for assignment of new black teachers were summarily and knowingly granted by defendants. (A weak defense by defendants of adult role model philosophy was rejected by the court.) In addition, a continuing flow of experienced teachers from black to white schools was allowed to occur. Finally, many black teachers were without transfer rights at all (e.g. provisional teachers), or had less seniority than white teachers (seniority being the basis of transfer rights). These factors aggravated faculty quality in black schools.

Secondly, plaintiffs alleged racial discrimination in hiring and promotional policies which violated the constitutional rights of public school students to have the school system operated free of racial discrimination. Evidence showed a 5% black permanent teacher ratio in comparison to a 33% black Boston student ratio, and a 16% overall black Boston population ratio. The court found that defendants were aware of this problem, but answered it with much talk and little action. Also known discriminatory testing procedures were used for hiring criteria, and known discriminatory rating systems were used for promotion criteria.

The court therefore found that plaintiffs had established both of these allegations.

VI. Elite Schools and Vocational Programs

Elite schools in Boston admitted students only by competitive examinations, and were heavily white. Various vocational programs operated at several high schools were also predominantly white. The question presented was whether this racial segregation was intentional and therefore unconstitutional.

Defendants' Argument

Defendants raised some major defenses which pertained to a number of plaintiff's claims. First, defendants contended that the segregation in Boston's schools was the inevitable consequence of segregated housing patterns for which they were not responsible. Also defendants asserted that they had adhered to a neighborhood school policy which is a constitutionally valid concept regardless of segregative consequences. The court answered these defenses by first stating that it is now generally recognized that

*Defendants have encountered problems with the federal government for alleged violations of the Civil Rights Act of 1964: alleged discrimination on the basis of race. On April 19, 1974, which was prior to the instant case, the Department of Health, Education, and Welfare found defendants guilty of intentional segregation. HEW decided that Boston had, by persistent continuing segregative practices, intentionally created a dual school system. As a result, the federal government, pursuant to United States Code Title 42 §2000d-1, withheld more than five million dollars in federal school funding.

school officials' practices may (and in this case do) have a substantial impact upon housing patterns. Secondly, when school officials (such as in Boston) have followed for at least a decade a persistent course of conduct which intentionally incorporates residential segregation into the system's schools, that conduct is unconstitutional. Third, when school districting or a neighborhood school policy is fraught with segregative exceptions (such as Boston) neither defense is valid.

The court further found that no part of Boston is a separate, identifiable and unrelated section of the school district that would require it to be treated as isolated from the rest of the district. (See *Keyes* case *supra*.)

Court Ruling: The court found that the evidence did not warrant a finding that state defendants intentionally contributed to or participated in any substantial way in creating or maintaining racial segregation in Boston public schools.

The court found, based on the record of trial as a whole, that the defendants knowingly carried out a systematic program of segregation affecting a substantial portion of the school system including all of the city's students, teachers, and school facilities, and intentionally brought about and maintained a dual school system. Therefore, the entire school system of Boston is unconstitutionally segregated.

The court ordered defendants permanently enjoined from discrimination upon the basis of race in the operation of Boston public schools, and from creating, promoting, or maintaining racial segregation in any school in the Boston system.

The court also preliminarily enjoined the defendants from:

1. failing to comply in any respect with the Racial Imbalance Act Plan ordered by the state court (including busing);
2. beginning the construction of any new facility or the placement of any new portable;
3. granting transfers of white teachers from black schools or black teachers from white schools;
4. granting transfers under exceptions to the controlled transfer policy.

The court further charged the defendants with an "affirmative obligation" to reverse the consequences of their unconstitutional conduct. In order to assist the defendants in this obligation, five remedial principles were outlined:

1. The goal is to dismantle the dual system and compliance requires desegregation;
2. The primary responsibility for desegregation lies with the Boston school committee, and no amount of public opposition will excuse avoidance of this obligation;
3. Whatever steps are necessary must be taken, including:
 - busing
 - pairing of schools
 - redistricting
 - involuntary student and faculty assignments
 - altering of feeder patterns;
4. Utilization of racial composition of the whole school system as a guide to objectives;
5. Time allowed for compliance must be only that reasonably necessary to design, evaluate, and implement court approved plans.

Washington v. Davis 462 U.S. 229 1976

Background: Several black police officers and rejected black applicants for employment as police officers brought an action against District of Columbia and Federal officials. The plaintiffs alleged that promotion and recruitment procedures were contrary to the Constitution and certain statutes. This decision involved the legality of Test 21 as a measure for rejecting applicants. Test 21 tested reading comprehension, vocabulary and other verbal skills. A score of 40 out of 80 was required to qualify for the police training program.

Plaintiffs claimed that the use of Test 21 in this manner violated their equal protection rights. (Although the Equal Protection Clause of the Fourteenth Amendment would not apply because this case did not involve a state action, the due process clause of the Fifth Amendment protect those same rights from infringement by the Federal government or the District of Columbia and a normal equal protection analysis is used.) Defendants claimed that the use of Test 21 satisfied the constitutional requirements of equal protection as well as certain statutory requirements. Plaintiffs did not allege that there was intentional discrimination but did argue that the use of Test 21 had the highly discriminatory

impact of screening out four times more black applicants than white applicants and furthermore, that Test 21 was not an accurate predictor of future job performance.

The district court made a number of findings in regard to plaintiffs' claims including: (1) the number of black police officers is not proportionate to the racial mix of the city; (2) a higher percentage of black applicants fail to achieve the required score on Test 21 than do white applicants; and (3) Test 21 has not been shown to be a reliable measure of subsequent job performance.

These findings were sufficient to switch the burden of proof to defendants to explain the use of Test 21 in the hiring process. Nevertheless, the district court found that the defendants had met their burden and had sufficiently explained the use of the test and were therefore entitled to summary judgement. The district court based its conclusion on several factors, including: (1) the number of black recruits approximated the proportion of 20-29-year-old blacks in the recruiting area; (2) the police department had actively sought to recruit more black applicants; (3) the Test 21 scores were related to the scores of the final tests of the

training program; and (4) there was no showing that Test 21 was culturally biased.

The district court's decision can be found at 348 F. Supp 15 (D.C., 1972).

Plaintiffs' only contention on appeal was that the district court erred in not finding a constitutional violation in the use of Test 21. The court of appeals applied the standard of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and found that there was a constitutional violation and reversed the decision of the district court. 512 F.2d 956 (D.C. Cir., 1975). (The *Griggs* case was a Title VII action and involved the use of tests to determine promotions, pay increases, etc. The Supreme Court held that if the use of such tests had the impact of excluding a disproportionate number of minority persons, then there is a violation of Title VII unless the employer can show that the test is an adequate predictor of future job performance. In a Title VII suit, intent to discriminate was deemed irrelevant.) The court of appeals used the *Griggs* standards even though this case was based on constitutional grounds. The court of appeals held that the plaintiffs had demonstrated the disproportionate impact of Test 21 and that the defendants had not shown that Test 21 was an adequate measure of future job performance. The court of appeals said that the affirmative efforts of the police department to recruit more blacks was irrelevant.

Court Ruling: The Supreme Court reversed the court of appeals saying that the Title VII standards of *Griggs* were not the constitutional standards. A violation of equal protection requires a showing of intent to discriminate and plaintiffs had made no such showing.

Opinion: Justice White.

Neither side raised the issue of whether the proper standards had been utilized. Nevertheless this was the basis of the Supreme Court's decision. The Supreme Court invoked the "plain error" rule which allows it to review issues when the error is obvious even though neither party presents the issue for review. In this case the "plain error" was that the court of appeals applied statutory standards to a case involving purely constitutional issues. Because the court of appeals relied on *Griggs*'s standards, that decision must be reversed.

The Supreme Court then went on to review what the appropriate standard is, under the Constitution. The court said that the equal protection component of the due process clause of the Fifth Amendment prohibits the United States government from invidiously discriminating against people or groups. An essential element of invidious discrimination is a purpose or intent to discriminate. The Supreme Court has not accepted the proposition that a law or action can be found to be discriminatory solely on the basis of its racially disproportionate impact. The court traced the development of equal protection cases in several areas and found that intent to discriminate was required for an equal protection violation in all areas of the law including: (1) congressional reapportionment cases, *Wright v. Rockerfeller* 376 U.S. 52 (1964); (2) school desegregation cases, *Keyes v. School District No. 1* 413 U.S. 189 (1973); and (3) social security cases, *Jefferson v. Hackney* 406 U.S. 535 (1972).

The Supreme Court noted that intent to discriminate need not be expressed and may "be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 426 U.S. 242.

The Supreme Court went on to say:

... Various courts of appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.¹² The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement. 462 U.S. 244-5.

In footnote 12 of the above-quoted portion of the decision the Supreme Court listed several cases with which it apparently disagreed. Footnote 12 is found at 426 U.S. at 244-5 and is reprinted here in its entirety.

¹²Cases dealing with public employment include: *Chance v. Board of Examiners*, 458 F. 2d 1167, 1176-1177 (CA2 1972); *Castro v. Beecher*, 459 F. 2d 725, 732-733 (CA1 1972); *Bridgeport Guardians v. Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1337 (CA2 1973); *Harper v. Mayor Baltimore*, 350 F. Supp. 1187, 1200 (Md.), aff'd in pertinent part sub nom. *Harper v. Kloster*, 486 F. 2d 1134 (CA4 1973); *Douglas v. Hampton*, 168 U.S. App. D.C. 62, 67, 512 F2d 976, 981 (1975); but of. *Tyler v. Vicery*, 517 F2d 1089, 1096-1097 (CA5 1975), cert. pending, No. 75-1026. There was also District Court cases: *Wade v. Mississippi Cooperative Extension Serv.*, 372 F. Supp. 126, 143 (ND Miss. 1974); *Arnold v. Ballard*, 390 F. Supp. 723, 736, 737 (ND Ohio 1975); *United States v. City of Chicago*, 385 F. Supp. 543, 553 (ND Ill. 1974); *Fowler v. Schwarzwaldner*, 351 F. Supp. 721, 724 (Minn. 1972), rev'd on other grounds, 498 F. 2d 143 (CAS 1974).

In other contexts there are *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (CA2 1968) (urban renewal); *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F. 2d 108, 114 (CA2 1970), cert. denied, 401 U.S. 1010 (1971) (zoning); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F. 2d 291 (CA9 1970) (dictum) (zoning); *Metropolitan H.D. Corp. v. Village of Arlington Heights*, 517 F. 2d 409 (CA7), cert. granted, 423 U.S. 1030 (1975) (zoning); *Gautreaux v. Romney*, 448 F. 2d 731, 738 (CA7 1971) (dictum) (public housing); *Crow v. Brown*, 332 F. Supp. 382, 391 (ND Ga. 1971), aff'd, 457 F. 2d 788 (CA5 1972) (public housing); *Hawkins v. Town of Shaw*, 437 F. 2d 1286 (CA5 1971), aff'd on rehearing en banc, 461 F 2d 1171 (1972) (municipal services).

The Supreme Court then said that the Constitution does not prevent the government from "seeking modestly to upgrade the communicative abilities of its employees" (p. 246) and just as an action by all persons who failed Test 21 would not succeed on equal protection grounds, so too

should an action by blacks who failed not succeed absent any showing of discriminatory intent.

The Supreme Court concluded its discussion on the constitutional aspects of this case by saying that a rule which would make a statute constitutionally invalid because it has a disproportionate impact on a class or race, even though the statute is designed to serve neutral ends, could lead to serious problems in the areas of tax laws, licensing statutes, etc. The court acknowledged that Congress can legislate a rule based on disproportionate impact, and that Congress has done so in the area of employment. However, the Supreme Court said that it would not extend such a rule to other areas by adopting it as a constitutional standard. Any such extension of the disproportionate impact rule "should await legislative prescription." (Editor's Note: There are many who are now hypothesizing that barring a sudden change in the composition of the court, the next major thrust for desegregation/integration and states' equity will come from the legislative, not the judicial, branch.)

The Supreme Court dealt briefly with the statutory aspects of this case. The defendants argued that they had complied with all Title VII requirements. The plaintiffs agreed that Title VII requirements should be used. The key issue was whether the job-relatedness standard was satisfied by Test 21. The Supreme Court found that the relationship between Test 21 and the training course completion was sufficient to satisfy the applicable statutory standard (i.e. job-relatedness) even though the Supreme Court did not allow a remand to investigate what relationship, if any, existed between course completion (passing a final test) and material taught by the course. The court did not require a remand because the training program had undergone significant changes since this suit was brought and any future problems could be dealt with under the amended Title VII. In upholding the propriety of the Test 21 to training course standards, the Supreme Court was acting in accordance with the regulations and current views of the Civil Service Commission, the agency empowered to administer the statutes referred to by the defendants.

Concurring Opinion: Justice Stevens

Justice Stevens agreed that intent to discriminate is an essential element for any successful equal protection suit. Stevens pointed out, however, that the line between intent and impact is not as clear as the majority may lead one to think, and that "(f)requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." (p. 253).

The good faith efforts of the District of Columbia officials would not save Test 21 if it were unconstitutional. However, the Test 21 was constitutionally valid because (1) it serves a neutral and legitimate purpose and (2) it is given throughout the federal system. The District of Columbia police applicants are only a small percentage of that number so the showing of a disproportionate impact on such a small percentage could not support a finding that Test 21, in general, is discriminatory. A presumption of validity arises in favor of seemingly neutral acts and the evidence here did not rebut that presumption.

Stevens then turned to the Title VII aspects of the case, "even though, as the Court makes clear. . . there is no Title VII question in this case" (p. 255). Stevens said that because the parties agreed that Title VII standards applied to the non-Title VII statutory provisions, this issue should be addressed. Stevens focused in on the job-relatedness question and dealt with the question by dividing it into two components. First, as a matter of law, a test which predicts how well a person will do in the training program will be sufficient to satisfy the statutory requirements involved. Stevens seemed to think that Title VII involved slightly different requirements than the statutes here and that the court should not be bound by those Title VII standards. Second, as a matter of fact, there was sufficient evidence for the district court to conclude that there was a sufficient correlation between the test scores of Test 21 and training program success for the decision of the district court to be upheld.

Dissenting Opinion: Justice Brennan, joined by Justice Marshall

Brennan notes that the court should not have considered the statutory aspects of this case. Only constitutional issues were raised on appeal and the court dealt with them under the "plain error" rule. But because the court did deal with the statutory aspects, Brennan also addressed those issues. In a footnote early in his opinion Brennan noted that he did not intend to address the constitutional aspects of this case and he limited his opinion to the statutory issues.

Brennan examined the statutory provisions regulating employment, 5 USC 3304, and Title VII 3304 was the applicable statute in this case and was administered by the Civil Service Commission (CSC). Title VII administered by Equal Employment Opportunity Commission (EEOC). The CSC considered the 3304 standards to be identical to Title VII standards. Brennan believed that the courts should give deference to the administrative agency empowered to administer a statute and that the Supreme Court in this case did not apply the proper standards either under CSC regulations or EEOC regulations.

The CSC regulations said that a preliminary or entrance examination will be valid if it is a sufficient indicator of probable success in a training program. The mere fact that the entrance test mark correlates to a training program final test is not sufficient unless there is a showing that the final test is a proper evaluation of what was taught in the training program. In this case, because there was no proof that this second element was satisfied, the CSC and Brennan would find that the defendants had not satisfied their burden of proof under 3304.

Brennan also found that Title VII standards had been satisfied. Unlike the CSC regulations, the EEOC does not allow for validation based on correlation between entrance test and training program performance. The correlation must be between the training test and acquisition of job related abilities. In this case, because there was no full description of the criteria that the test was expected to measure, there could be no way for the courts to check the correlation; and, therefore, the defendants would again fail to satisfy their burden or proof.

Finally Brennan disagrees with the majority's view that this decision has left the *Griggs & Albemarle Paper Co. v. Moody*, 422 US 405 (1975), decisions intact. Those cases set down specific standards which have been implicitly adopted by Congress. This decision is not consistent with those standards especially because it reduces the emphasis that entrance tests be job-related by substituting a training-program-related standard. This change and others may have profound impact on the future of employment cases. Brennan pointed out one possibility:

As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of the training program. Any contention that the resulting correlation between examination scores would be evidence that the initial test is "job related" is plainly erroneous. It seems to me, however, that the court's holding in this case can be read as endorsing this dubious proposition.

Selected Law Review Articles

1. "Supreme Court Reports," Rowland L. Young, 63 *American Bar Association Journal* 92 (Jan., 1977).

This article is a brief summary of the *Washington* decision including the concurring and dissenting opinions.

2. "*Washington v. Davis*: Reassessing the Bars to Employment Discrimination," Daniel Turbow, 43 *Brooklyn Law Review* 747 (Spring, 1977).

The first part of this article is a summary of the *Washington* decision. The writer then examines a double standard which he believes the Supreme Court established in the area of employment testing. On the one hand there is the statutory standard which applies to Title VII cases and is set out in the *Griggs* decision. This statutory standard was adopted by several lower courts as the equivalent to equal protection standards which were applicable when public employers were involved. These lower courts were trying to formulate a uniform standard to be applied to public and private employers alike.

On the other hand, the *Washington* decision clearly states that constitutional and statutory standards are not alike. The Constitution requires a showing of discriminatory intent whereas Title VII and other statutes require a showing of discriminatory impact. This, the writer believes, creates a double standard with the different levels of proof required. The writer points out that certain language in the decision may allow for discriminatory impact to be a basis for showing discriminatory intent in certain situations. Nevertheless, it would appear that the line between impact and intent has been firmly established and is of critical importance to the court.

The writer then turns to the court's examination of the statutory standards. The writer explains that such an examination was necessary because the district court's decision rested at least partly on statutory grounds when it granted summary judgement in favor of the defendants. The sole issue in regard to the statutory standards was whether the job-relatedness component was satisfied. The writer believes that the Supreme Court has adopted a new test for job-relatedness even though the court said it was not altering the *Griggs* decision. The writer was not sure what effect this

change would have on Title VII cases but the fact that the Supreme Court has changed the job-relatedness test for some cases may indicate that the court will change it for Title VII cases as well.

The writer distinguishes *Griggs* from *Washington* by pointing out that *Griggs* involved an employer with a history of racial discrimination whereas in *Washington* the employer was taking affirmative action in regard to minorities. Although this factor was not articulated, it may have been an underlying policy consideration. If such were the case, the writer says it would have been better for the court to have clearly stated its reasons rather than change the law of job-relatedness altogether. In any event, the writer believes that a few more decisions will have to be rendered before it is clear what the court will do in this area.

3. "Constitutional Law-Civil Rights-Employment Discrimination," Gary K. Saidman and Nichols M. Wright, 25 *Emory Law Journal* 737 (Summer, 1976).

The writers first review several cases wherein the courts, including the Supreme Court, have required a showing of discriminatory intent before an equal protection violation would be found. Cases involving apportionment, school desegregation and welfare statutes were examined. The writers review the *Griggs* and *Albemarle* cases to show how Congress has sought to implement certain safeguards.

The writers outline the Supreme Court's decision in *Washington*. They point out how the court has declined to use the statutory standards of *Griggs* as constitutional standards and how the court emphasized that a showing of discriminatory intent was necessary for an equal protection violation.

The writers then turn to the statutory aspects of the decision. They believe that the court changed the job-relatedness standard and that it did so by allowing a relationship between the preliminary examination and the job training exam to satisfy the standard. The decision was based on 5 USC § 3304 and not on Title VII so the impact on Title VII cases is unclear. The writers point out that the court ignored arguments raised by the Civil Service Commission that § 3304 and Title VII standards were identical and that the use of Test 21 did not satisfy those standards.

The writers predict that the Supreme Court may resort to a sort of sliding scale in equal protection cases where the more discriminatory impact is shown, the less discriminatory purpose will need to be shown in order to establish an equal protection violation.

4. "The Supreme Court Term—Equal Protection," 90 *Harvard Law Review* 114 (Nov., 1976).

This article first summarizes the *Washington* decision. The writer then examines some of the problems which may be caused by this decision. In regard to the constitutional aspects of the decision, the writer says:

- a. The Supreme Court said that discriminatory impact is not to be the sole touchstone in finding discriminatory intent, but it is not to be ignored either. However, the court did not indicate how much weight would be given to a showing of discriminatory impact.
- b. The burden of proving intent is difficult to meet in any situation. Furthermore, discriminatory intent can often result in discriminatory impact but such a situation could very well be remediless under this decision.

- c. The Supreme Court has often been the protector of the discrete and insular minorities. This decision seems to be a reversal or an abdication of that role. The court seems to be forcing those groups to seek relief from the political arena, i.e. Congress, even though those groups do not have the power or influence to succeed in that arena.

As to the statutory aspects of the case the writer says that the court did use a job-relatedness standard different from the Griggs standard. However, the writer is not sure what impact this difference will have on the future use of the Griggs standard because Griggs sought to implement Title VII whereas this case dealt with a different statute. The writer believes that the Griggs job-relatedness standards should remain intact as to Title VII cases.

5. "Racial Discrimination Under the Constitution and Title VII—More Deference to the Reasonable Practices of Lawmakers and Employers," Robert G. Nida, 37 *Louisiana Law Review* 973 (Spring 1977).

The writer summarizes the Washington decision and discusses the possible impact of the constitutional aspects of the decision. The writer believes that the impact of the change in constitutional doctrine will probably be slight in the area of employment testing because Title VII now applies to most employers, both private and public. Therefore plaintiffs will not have to use constitutional grounds in this regard. In other areas, the holding that discriminatory intent will be required before an equal protection violation is established may have more of an impact. However, this writer seems to believe that the court has allowed some relief for plaintiffs in that discriminatory intent may be inferred from sufficient discriminatory impact. This writer believes that the Washington and Arlington Heights decisions give some indications as to when a sufficient impact has been shown.

The writer concludes by examining the effect of the decision on Title VII standards. Even though the court specifically stated that this was not a Title VII case the writer believes that this decision will affect the Title VII standards because the case was decided under standards almost identical to those of Title VII.

6. "Employment Discrimination—Washington v. Davis: Splitting the Causes of Action Against Racial Discrimination in Employment," Alan Goodman, 8 *Loyola University of Chicago Law Journal* 225 (Fall, 1976).

The article first reviews the opinions of the various courts of the Washington case and briefly explains how tests are used in employment. The writer then summarizes the equal protection doctrine before the Washington decision. He says some lower courts did not require a showing of discriminatory intent and that discriminatory impact alone resulted in a suspect classification and therefore was violative of equal protection. The writer cites *Smuck v. Hobsen*, 408 F.2d 175 (D.C. Cir. 1969) and other cases in support of this contention. Even though a suspect classification was established some of the lower courts did not apply a strict scrutiny test to the state action. Some courts allowed an examination to be used if sufficient job-relatedness was shown. This was the Title VII standard. Other courts allowed the test if a mere rational relationship was shown.

The Washington decision changed the equal protection rule by requiring a showing of discriminatory in-

tent. The writer contends that this new standard will render equal protection useless in correcting abuses in employment testing. This is so because: (1) intent is difficult if not impossible to prove, and (2) if intent can not be shown, a low level review will be utilized and such a review almost always results in the state action being upheld.

The writer continues his criticism of the constitutional aspects of the decision by noting that while the court did say intent may be inferred from discriminatory impact in some situations, the court set no guidelines as to when such an inference would be proper. The writer sees this decision leading to "Congress becoming the guardian of equal protection by judicial abdication" (p. 242) because now the court will wait for Congress to legislate when special protections are needed. Title VII is one example of this.

As to the statutory aspects of the decision the writer observes that the court has changed the job-relatedness standard to a training-program-related standard. Since this case was decided under statutes other than Title VII the change of the job-relatedness standard may not affect future Title VII cases. The writer points out that the court said it was following Civil Service Commission guidelines and regulations but that the CSC was arguing that Test 21 did not satisfy those guidelines. It would seem that the court created its own standard and did not follow the CSC.

The writer observes that there are now three distinct remedies available for racial discrimination in employment testing: (1) equal protection clause, (2) Title VII, and (3) other statutes. In the area of employment testing, the change of equal protection standards may not be significant because Title VII, as amended, may afford adequate protection. The change in the job-relatedness standard will be more cause for concern if it extended to Title VII cases. The writer does not see this happening; therefore he believes that there is adequate protection in this type of situation.

7. "Recent Decisions—Constitutional Law—Civil Rights—Standard for Relief in Racial Discrimination Cases Requires a Showing of Discriminatory Intent," T. Keith Fogg, 11 *University of Richmond Law Review* 209 (Fall, 1976).

This article is a summarization of the Washington decision. In the article the writer makes the following observations:

- a. When the lower courts adopted a Griggs standard for equal protection cases involving racial discrimination in public employment, they were creating a middle level of review for equal protection cases. This middle level was rejected by the Supreme Court in Washington.
- b. When the Supreme Court criticized the lower courts for finding constitutional violations on the basis of discriminatory impact, the court listed several cases so criticized in footnote 12. The writer points out that no school desegregation cases were listed in footnote 12. He is not sure of the significance of the omission but he thinks it is notable.
- c. The relaxation of the job-relatedness standard may not be binding as to Title VII cases but it does show a tendency of the court to go in that direction and it may be an indication of what the court may do in Title VII cases as well.

The writer concludes by saying, "It is apparent that the court is retreating from its earlier position as a leader in

the field of civil rights. . . By stiffening the standards for proving unconstitutional activity and emphasizing the availability of statutory remedies, the Court has shifted the burden to the executive legislative branch to provide the impetus for the future" (p. 220).

8. "Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington v. Davis, Arlington Heights, Mt. Healthy and Williamsburg*," Barry A. Miller, 12 *Harvard Civil Rights Civil Liberties Law Review* 725 (Summer, 1977).

The writer begins this article with an examination of racial discrimination laws prior to the *Washington* decision. His discussion involved a rather extensive analysis of equal protection doctrine. A brief summary of the writer's discussion is as follows:

- I. Equal protection clearly protects against racial discrimination but what value(s) underlie this protection? Does equal protection protect:

- a. The right to equal treatment, i.e., that no decision be made based on racial considerations or at least only allow race-based decisions as a remedy for past de-jure discrimination
- b. The right to equal status, i.e., decisions can be based on race so long as they do not cause disadvantage to traditionally disfavored groups.

The court has not clearly decided which value is the primary basis for equal protection doctrine and often tries to reconcile the two.

- II. Before *Washington* the Supreme Court did not decide what would trigger strict scrutiny. It was not clear whether discriminatory impact or discriminatory intent had to be shown. This difficulty can be traced to the Supreme Court's failure to determine which value was the primary basis for equal protection.

- III. Most courts decided that discriminatory purpose had to be shown but there were a variety of tests used for establishing that purpose. These tests included:

- a. Reasonably foreseeable consequences test, i.e., either the discriminatory impact was foreseen or it was corrected when it occurred. Either way, discriminatory intent is presumed. This test seems to favor the equal status value.
- b. Subjective motivation test, i.e., what the lawmakers were actually thinking about. This test involves difficult problems of proof and seems to favor the equal treatment value.
- c. Cumulative violation test, i.e., examine the overall actions of the lawmakers for discriminatory intent. Such a test offers no precedential value.
- d. The Omaha presumption test, i.e., if there is a reasonably foreseeable discriminatory effect there is a presumption of discriminatory intent which can be rebutted by a showing that the action was motivated entirely by legitimate considerations. The writer sees this approach as giving weight to both values of equal protection.

After the writer outlines the equal protection doctrine he proceeds to evaluate how each of several recent Supreme Court decisions affected the law. The *Washington* case resolved the problem of whether discriminatory impact or intent was required for an equal protection violation. The court seemed to have a two-fold rationale for deciding that discriminatory impact alone would not suffice. First, a disproportionate impact test may be overinclusive in that it may include

many types of legislation which should not be questioned. Second, there was a benefit to the police department in using the test. The court seemed to say that a violation of equal status alone would not trigger strict scrutiny but the court declined to adopt equal treatment as the dominant value either. The writer sees some language in the decision as indicating that the court is allowing or inviting Congress to adopt legislation which would favor equal status. At the same time the court refuses to adopt that value itself. It doesn't appear that the Constitution would prohibit the court from doing so; rather, it is a matter left to the court's discretion and the court does not wish to adopt the equal status value as the dominant value for equal protection.

The writer continues his evaluation of recent cases by discussing several additional cases including:

1. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The Supreme Court reaffirmed the need to show discriminatory purpose and listed several factors to consider in making that determination. Those factors included:

- a. the disproportionate impact of the action
- b. historical background
- c. specific sequence of events
- d. legislative record.

While the court did not reject outright any of the tests for discriminatory purposes, it seems to favor the Omaha presumption test or the cumulative violation test. Likewise, it is not clear what value the court deems controlling although it seems to favor the equal treatment value.

2. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The Supreme Court dealt with the issue of what level of review is proper when there are legitimate and discriminatory purposes involved. The court adopted a "same decision" test wherein plaintiff must show that there was an improper motive and strict scrutiny will result unless defendant shows that the same action would have been taken if the improper motive was not present.

3. *United Jewish Organization of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977). This case said that race conscious decisions are acceptable as long as they are not motivated by "racial slur or stigma" or there is no invidious purpose involved. In other words, the equal protection clause does not require that the government be color blind.

The writer tries to summarize the law in this area. He says that a finding of unconstitutional racial discrimination requires a finding of an invidious discriminatory purpose which was a but-for cause of the government action (i.e. the action would not have occurred but for the improper purpose). A presumption of discriminatory purpose will arise if it is shown that the governmental decision: (1) made a racial classification on its face, or (2) was applied in a discriminatory manner, or (3) had a reasonably foreseeable discriminatory effect.

This presumption can be rebutted by showing: (1) the decision would have resulted absent the improper purpose, and (2) there was no invidiousness or "racial slur or stigma."

This approach, says the writer, would allow for the courts to continue to consider both values of equal

protection and would allow for the continuance of affirmative action programs.

9. "Discriminatory Purpose: What it Means Under the Equal Protection Clause—*Washington v. Davis*," Katherine Lambert, 26 *DePaul Law Review* 650 (Spring, 1977).

This article reviews the *Washington* case and predicts what the impact of that decision will be. The writer saw two main classifications of cases which will be affected by that decision: (1) public employment cases, and (2) non-public employment cases. In the first classification, *Washington* made it clear that discriminatory intent is essential for equal protection violations and that Title VII standards would not be adopted as part of an equal protection analysis.

As to the second classification the writer sees the decision as having some impact but is not sure how much. The court left some key questions unanswered such as whether discriminatory purpose must be the sole reason for the action or what factors should be considered in determining whether there is discriminatory intent. These questions were partly answered by *Arlington Heights* but because complete answers are lacking, it is difficult to forecast what the overall impact of *Washington* will be in regard to equal protection cases. Perhaps the only sure impact will be the continuance of litigation in this area in an effort to ascertain some answers.

10. "Beyond *Griggs v. Duke Power Co.*: Title VII after *Washington v. Davis*," James D. Portwood and Stuart M. Schmidt, 28 *Labor Law Journal* 174 (March, 1977).

This article deals with the impact of the *Washington* decision on the effectiveness of Title VII. The writers believe that the impact may be significant even though it was not a Title VII case because: (1) it demonstrates the unwillingness of the court to automatically defer to administrative interpretation of federal statutes; such deference was commonplace in the past, and (2) if the reduced standards for job-relatedness are adopted for Title VII cases it will make it easier for employers to satisfy the requirements of Title VII and at the same time not satisfy the spirit of Title VII.

The writers were not sure whether *Washington* was an aberration or a start of a new trend by the Supreme Court. In either case, they see it as a significant change from the attitude present in the *Griggs* decision.

11. "*Washington v. Davis*: Quantity, Quality and Equality in Employment Testing," Barbara Lerner, 1976 *Supreme Court Review* 263.

The writer observes that the promises of the Warren court have not materialized in that blacks and other minorities are still suffering from inequalities. These inequalities are especially present in employment and education. This article concentrates on employment problems.

In employment testing the writer sees two main problems: (1) establishing a reasonable standard for proof of employer discrimination, and (2) establishing a reasonable standard for proof of job relatedness.

As to the first problem the writer compares *Griggs* and *Washington* as a constitutional case. The key distinction, which the court hints at but does not develop, is that *Griggs* dealt with discrimination in promotion whereas *Washington* dealt with discrimination in hiring practices. The writer argues that the test for dis-

crimination should not be the same for both situations. Where promotion is involved, there is a definite pool of applicants who are arguably equal because they hold the same job; therefore a test which excludes a disproportionate number of one class more likely is due to employer's discriminatory intent. On the other hand, when hiring is involved the pool of applicants can be varied and there is no real way of evaluating if discrimination is a true purpose behind the discriminatory effect. The *Washington* case is a good example of this proposition. In *Washington*, the police department actively recruited black applicants and 72% of those taking the test were black. It is probable that many of those applicants were not qualified and Test 21 merely clarified this. It should not be inferred that the department had discriminatory intent from these facts.

The writer would like to see a requirement of intent imposed even on Title VII standards. She uses the following illustration to support her position. Suppose 100 positions are available: 1000 blacks and 100 whites apply. A test is given and 80 blacks and 20 whites are hired. Ten times more blacks than whites failed the test so it may be possible to bring suit against the employer under Title VII because of the disproportionate impact of the test. The writer argues that this would not be fair and a requirement of intent would rectify the situation.

The second major problem that the writer deals with is the establishment of a reasonable standard for determining job-relatedness of a test. Again the writer argues that different standards should be used depending on the job involved. The writer spends considerable time discussing the various aspects of test validation. Test validation is necessary to determine if the test measures what it claims to measure. The writer describes three basic techniques for test validation:

- a. Criterion Validity: involves identifying criteria that indicate successful job performance and then showing a correlation between test scores and those criteria.
- b. Construct Validity: involves showing that a test is structured to determine the degree to which an applicant possesses certain characteristics which have been determined to be important to successful job performance.
- c. Content Validity: the content of the test closely approximates the tasks to be performed on the job.

The writer argues that criterion valid tests are acceptable for simple jobs (those jobs requiring simple tasks with frequent repetition) but construct valid tests are preferable for complex jobs. The writer notes that scientifically speaking it would be preferable to postpone the use of any test until it is sufficiently validated. However, this luxury of delay is not available to employers and courts who must decide which test(s) will be used. Even though a test is not totally validated, the employers, and the courts should look to science for whatever guidance may be found.

The writer recommends that tests continue to be used in employment. She justifies this recommendation as follows. First, when there are more applicants than positions available, an employer must make a choice. This choice can be based on qualitative or quantitative criteria. Qualitative criteria usually encompasses the use of tests, educational requirements, and/or social characteristics (prior experiences, etc). Quantitative criteria usually involve quotas, random selection, etc. On the qualitative side, educational requirements are usually not challenged and social char-

acteristics would tend to introduce more chance for discrimination. Tests which have been validated as well as possible seem to be the best alternative. On the quantitative side the writer argues that most blacks (and other minorities) do not desire quota systems and that quality in education, employment, and so forth is their main goal. The use of quotas would possibly tend toward job simplification, thereby increasing worker dissatisfaction and possibly increasing racial bitterness.

The writer realizes that tests are not perfect and that the best way to attain equality in the job market is to increase the equality of education. But because equalizing education will take a long time, employment tests, which have been validated as well as possible should continue to be used in order to avoid the problems associated with alternative employee selection.

12. "Challenges to Preemployment Tests After *Washington v. Davis*," Julie D. Fay, 5 *Hofstra Law Review* 892 (Summer, 1977).

This article reviews the *Washington* decision. The writer notes that constitutional challenges to employment testing may still be important even though Title VII has been amended to include public employers. Equal protection may be important because: (a) Title VII limits monetary awards; (b) Title VII involves more complex procedures; and (c) Title VII does not cover all employers.

The writer then examines the differences between statutory and constitutional challenges to employment testing. She observes that lower courts have attempted to unify the standards but the Supreme Court in *Washington* clearly demonstrated that the standards are not to be the same. The key difference is in plaintiff's burden of establishing a prima facie case. Under Title VII a showing of disproportionate impact will suffice but under the Constitution, a showing of intent to discriminate is required. This extra burden under the Constitution makes it difficult if not impossible for plaintiffs to establish a violation and prevents them from the advantage of the strict scrutiny level of review. Strict scrutiny is used for invidious discrimination to plaintiffs. Instead, plaintiffs have to proceed under Title VII which allows the employer to rebut plaintiff's prima facie case by showing that the test was job related. The Supreme Court in *Washington* reduced the employer's burden allowing job-relatedness to be shown between the test and the training program.

The writer notes that Title VII was not involved in the *Washington* case but feels that the decision does not balance well with Title VII. If the decision is also extended to the Title VII cases the result could be severe for plaintiffs in employment testing cases. Not only would relief be blocked on constitutional grounds but the reduced job-relatedness standard would reduce the possibilities for relief under Title VII.

13. "From *Washington* to *Arlington Heights* and Beyond: Discriminatory Purpose in Equal Protection Litigation," Robert G. Schwemm, 1977 *University of Illinois Law Forum* 961.

The writer first reviews basic equal protection analysis, i.e., the two-tiered approach with strict scrutiny when suspect classifications or fundamental rights are involved and low level scrutiny if neither is involved. The writer points out that the key question is what is a suspect class or a fundamental right. When suspect

classification is involved, the additional question of how to determine if there is actual discrimination is raised. This additional question gets into the area of whether discriminatory purpose or discriminatory effect or both is necessary for a constitutional violation to be established.

The writer then summarizes the various opinions in the *Washington* case and observes that the Supreme Court decided that discriminatory purpose or intent was required before an equal protection violation would be found. In other words, discriminatory impact alone is not sufficient. The writer reviews past Supreme Court decisions in this regard and finds that while the court had never expressly allowed discriminatory impact to be the basis of a constitutional violation, it had not rejected that idea either, until *Washington*. The writer cites several cases including *Wright v. Rockefeller*, 376 U.S. 52 (1964), *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Dandridge v. Williams*, 397 U.S. 471 (1970) in support of his proposition that the Supreme Court had been unclear as to whether impact or motive or both should control equal protection questions. Some decisions such as *Palmer v. Thompson*, 403 U.S. 217 (1971) even seem to suggest that discriminatory impact should be the test for determining equal protection violations. The writer can not find any clear support for the *Washington* decision in the prior cases of the Supreme Court.

The writer then reviews lower court cases decided prior to *Washington*. These cases seemed to demonstrate that the lower courts were using a flexible standard depending on what rights were being asserted. For example, when employment testing was involved an impact test similar to *Griggs* was used and when school desegregation was involved the courts focused on discriminatory intent to determine if equal protection had been denied. The writer also notes that some of the lower courts did not adhere completely to a two-tier analysis of equal protection and that some courts were willing to engage a sliding scale or intermediate level of review. The writer commends these developments and criticizes Justice White's fears that adopting an impact test would be detrimental to any state action, which is more burdensome to minorities, such as taxes. The writer believes that the decisions of the lower courts showed that this problem could be dealt with and that White's concern was unjustified. Furthermore, the writer says that the issue of impact or intent was an important issue and should not have been resolved on the basis of this "unrealistic fear of a purely theoretical danger" that an impact test would unleash numerous challenges on neutral state actions.

In any event, the discriminatory purpose requirements seems to have been solidly adopted by the Supreme Court in all types of racial discrimination cases under the equal protection clause. The writer argues that for White, purpose may mean an objective test rather than a subjective test and that such a test would allow for plaintiffs to prove a discriminatory purpose by showing sufficient discriminatory impact. This appears to help plaintiffs but other language in the opinion indicates that White would only require that part of the purpose of the legislation be proper. In other words, if some proper purpose can be found the legislation would be upheld regardless of any discriminatory impact. If this is an accurate reading of the opinion then "establishing the necessary discriminatory purpose

will be impossible in all but the most egregious instances of racial discrimination" (p. 1007).

The writer continues his discussion of the Washington case by noting that both the majority and concurring opinions emphasized two objective facts in reaching their opinions: a. the discriminatory impact of Test 21 did not demonstrate discrimination in the overall employment practices; and b. Test 21 served a legitimate purpose and it was validated. These facts indicate that the court may be examining the overall impact of the discriminatory actions and the legitimacy of the government's alleged nonracial purpose(s). These factors are similar to those the court would look at under an impact test but by approaching it from a purpose test standpoint, the court is able to give more consideration to the government's interests in deciding a case. The writer maintains that the use of objective standards will help plaintiffs establish discriminatory purpose, but it will by no means guarantee success.

The writer concludes by summarizing the article and making some predictions about the future of equal pro-

tection cases. He says that where the required showing of discriminatory purpose had a somewhat weak basis in Washington, it has been firmed by *Arlington Heights* and *Castaneda* so that there can be no doubt that this is the present standard. The three cases are somewhat at variance as to what evidence will establish a discriminatory purpose. It seems that the greater the discriminatory impact and the less legitimate the government purpose is then the lighter the burden of proof will be on plaintiffs. Other factors such as the Supreme Court's expertise in the area or the court's perception of the rights asserted may also effect the chances of success. The writer believes that the purpose test has increased the burden on plaintiffs and that it may force plaintiffs to seek help from Congress, through legislation, in order to prevent racial discrimination when that discrimination can hide behind a purported legitimate state purpose. The writer believes that the issues raised by the discriminatory purpose requirement will have to be grappled with for years to come.

**Village of Arlington Heights v.
Metropolitan Housing Development Corp.**
429 U.S. 252 (1977)

Background: Arlington Heights, a suburb of Chicago, experienced substantial growth in the 1960's, but its population of racial minority groups remained extremely low. Most of the land in the village was used, as , or was zoned for, detached single-family homes (R-3).

A religious order known as the Clerics of St. Viator owned an 80-acre tract of land just east of the center of Arlington Heights. Since 1959, when the village first adopted a zoning ordinance, all the land surrounding the order's property had been zoned R-3. In 1970, the order decided to devote some of its land to low and moderate income housing and contacted the Metropolitan Housing Development Corporation (MHDC). MHDC is a non-profit developer experienced in the use of federal housing subsidies and organized for the purpose of constructing low and moderate income housing throughout Chicago.

After some negotiation, MHDC and the order entered into an agreement of sale covering a 15-acre site upon which the housing was to be built. The sale agreement was contingent upon MHDC securing zoning clearances from the village and housing assistance from the federal government. If MHDC could not rezone the 15-acre tract or obtain federal assistance, the sale would not be valid.

The project, known as Lincoln Green, did not conform to the village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple-family classification. MHDC filed a rezoning petition with the Village Plan Commission and submitted the necessary materials. The materials made it clear that one requirement for government subsidy was "an affirmative marketing plan designed to assure that a subsidized development is racially integrated". The main issue before the public and Plan Commission was whether to permit a racially integrated housing project within an area dominated by single-family housing.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings which were attended by large crowds mostly opposed to the Lincoln Green project. Although some opponents addressed the "social issue" of a racially integrated housing project in the village, many focused on the petition's zoning aspects, stressing two major arguments. First, the area had always been zoned single-family and the neighboring citizens had built or purchased there in reliance on the classification. Rezoning threatened to cause a measurable drop in property values. Second, the village's multiple-family apartment policy, adopted in 1962, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

For these reasons, the Village Plan Commission and the Village Board of Trustees denied the petition for rezoning.

MHDC (plaintiffs and respondents) and three black individuals who were to become tenants filed this lawsuit against the village alleging that the rezoning decision violated the equal protection clause of the Fourteenth Amendment. The federal district court found for the village (defendants and petitioners) holding that the village was not motivated by racial discrimination or intent to discriminate against lower income groups when they denied rezoning, but rather by a desire "to protect the property values and the integrity of the village's zoning plan." *MHDC v. Village of Arlington Heights*, 373 F. Supp 208, at 211. In addition, the district court found that the denial would not have a racially discriminatory effect.

The courts of appeals reversed, concluding that the denial of rezoning violated the equal protection clause. *MHDC v. Village of Arlington*, 517 F.2d. 409 (7th Cir. 1976). The

court first approved the district court's finding that the village was not motivated by racial discrimination. However, the court of appeals observed and found that the denial would have a disproportionate impact on blacks since 40% of Chicago-area blacks were eligible to become tenants of Lincoln Green. While the court reasoned that a disparity in racial impact alone does not invoke strict or high level scrutiny of the village's decision, it ruled that denial of rezoning must be examined in light of its "historical context and ultimate effect." Northwest Cook County enjoyed rapid growth in population and employment opportunities, but continued to exhibit a high degree of racial segregation and was allowing itself to become an all-white community.

Because of this history of racial exclusion the court of appeals ruled that the denial of the Lincoln Green proposal had "racial discriminatory effects" and could be tolerated only if it served compelling governmental interests. Neither the buffer policy nor the desire to protect property values met this exacting standard of strict scrutiny.

Court Ruling: The Supreme Court first discussed whether the respondents, MHDC, *et al*, had standing to bring the suit, i.e., an injury fairly traceable to petitioner's acts, and concluded that they did.

The court of appeals decided the case before the Supreme Court handed down its decision in *Washington v. Davis*, 426 U.S. 229 (1976). The Supreme Court cited *Davis* for the proposition that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Washington v. Davis*, 426 U.S. 229 at 242 (1976). Proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause. The court continues, "*Davis* does not require a plaintiff to prove that the challenged action rests solely on racially discriminatory purposes." *Village of Arlington Heights v. MHDC*, 429 U.S. 252 at 265 (1977). A legislature or an administrative body is rarely motivated to make a decision based upon one particular purpose, and they are usually concerned with balancing the numerous competitive considerations. "But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose had been a motivating factor in the decision. . . judicial deference (to the political process) is no longer justified." *Id.* at 265-66.

Although the court explicitly adopted the discriminatory purpose requirement in *Davis*, it did not indicate the kinds of evidence that it would find probative of a discriminatory purpose. In *Arlington Heights*, the court devised a list of non-exclusive factors that it would consider probative of a discriminatory purpose. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Id.* at 266.

First, the disproportionate impact of official action, although rarely probative standing alone, is useful and provides "an important starting point. . . Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins*,

118 U.S. 356 (1886). . . *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)." *Id.* at 266.

Second, the historical background of the decision, particularly if it shows a series of invidiously motivated official actions, can be used as an evidentiary source. As examples the court cited *Griffin v. School Board*, 377 U.S. 218 (1964) and *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

Third, the specific sequence of events leading up to the challenged decision, including departures from normal procedures and departures from the substantive norms, usually applied. "For example, if the property involved here always had been zoned R-5, but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case." *Id.* at 267. See also, *Progress Development Corp. v. Mitchell*, 286 F.2d. 222 (7th Cir., 1961); *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d. 108 (2nd Cir., 1970). Substantive departures are relevant particularly if the factors usually considered important by the decision-maker strongly favor a contrary decision.

Finally, the legislative or administrative record or history of the decision may be highly relevant and probative of a discriminatory intent, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of official action, although even then such testimony frequently will be barred by privilege." *Id.* at 268.

The court next addressed the findings and evidence of the case at hand. "The respondents proceeded on the erroneous theory that the village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional." *Id.* at 268. Reviewing the evidence the court stated that "while the impact of the village's decision does arguably bear more heavily on racial minorities. . . there is little about the sequence of events leading up to the decision that would spark suspicion." *Id.* at 269.

The area around the order's property had been zoned R-3 since 1959 and the surrounding land was "undeniably committed to single-family homes as its dominant residential land use." *Id.* at 269. The rezoning request, according to the usual procedures and statements by the Plan Commission and Village Board of Trustees as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC's petition.

"In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the village's decision." *Id.* at 270.

It is important to note that after the last quote, the Supreme Court, in a footnote, indicated that proof that a racially discriminatory purpose had been a motivating factor in a government action or decision was not, by itself, sufficient to call for the traditional demands of strict scrutiny. Rather, the court stated that proof, in fact, of a discriminatory purpose would shift to the defendant "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were

established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose." *Id.* footnote 21, 270-71.

The plaintiff or complaining party must first prove that a discriminatory purpose motivated the governmental action. If established, the court would apply neither the strict, high level standard of review nor the traditional low level

standard. Instead, the court will require the defendant to show the same decision would have resulted without consideration of the racially discriminatory purpose. If the defendant can show that the discriminatory purpose was "harmless" and other legitimate reasons would engender the same result, then the governmental decision or action will not be invalidated.

Dayton Board of Education v. Brinkman [I]
433 U.S. 406 (1977)

Background: In April, 1972, parents in Dayton, Ohio filed a complaint alleging that the Dayton Board of Education operated public schools in a manner which unconstitutionally perpetuated racial segregation. The district court held a hearing limited to the single issue of whether the school system of Dayton was a dual, segregated one by reason of acts or omission of the Dayton Board of Education. In February, 1973, the district court found a "cumulative violation" of the Equal Protection Clause of the Fourteenth Amendment based on evidence of (1) racially imbalanced schools; (2) the use of optional attendance zones; and (3) rescission by the Dayton Board of Education of the previous board's resolution calling for racial and economic balance in each school in the Dayton system.

Both the plaintiffs and defendant board appealed the decision of the district lower court. The United States Court of Appeals for the Sixth Circuit affirmed the findings of a "cumulative violation", but concluded that the remedial plan ordered by the district court was inadequate. *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir., 1974). The district court's original remedial plan included elimination of optional attendance zones, some changes in hiring and assignment practices with respect to classified personnel in order to achieve representative racial distribution in all schools, a change in the freedom of enrollment plan so that students wishing to attend a certain school would be chosen at random instead of giving priority to students residing in the school's attendance zone and board-furnished transportation for any student choosing to attend a high school outside his or her attendance area.

The appellate court's first review of the case at 503 F.2d 684 consisted of considering both the historical instances of alleged discrimination and the circumstances surrounding the adoption of the board's resolutions and the subsequent rescission of those resolutions. The court of appeals held that the district court's finding of a three-part "cumulative violation" was amply supported by the evidence, but found the remedy ordered to be inadequate in light of the scope of the cumulative violations. The case was remanded to the district court to devise a remedy to eliminate "all vestiges of state imposed school segregation".

The district court undertook and adopted a revised desegregation plan followed by a second appeal to the circuit court. The revised and expanded plan was also found inadequate by the court of appeals. *Brinkman v. Gilligan*, 518 F.2d 853 (6th Cir., 1975). On its own initiative, the appellate

late court ordered the lower court to devise a systemwide remedy for the entire Dayton school system.

The district court finally adopted a broader, systemwide remedy which was approved by the sixth circuit. *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir., 1976). This plan required, beginning with the 1976-77 school year, that the racial composition of each school in the district be brought within 15% of the Dayton's 48%-52% black-white population ratio. The plan was to be accomplished by a variety of desegregation techniques, including the "pairing" of schools, the redefinition of attendance zones, and a variety of centralized special programs and magnet schools. The plan necessitated the regular transportation of about 15,000 students.

On appeal to the United States Supreme Court, the majority, speaking through Justice Rehnquist, vacated the court of appeals and remanded the case to the district court. The Supreme Court held that the district court's finding of a "cumulative violation" did not justify a systemwide remedy.

Court Ruling: In Dayton, the Supreme Court was concerned with whether the Dayton School Board acted unconstitutionally according to the standards set down in *Washington v. Davis*, 426 U.S. 279 (1976) and *Arlington Heights v. MHOC*, 429 U.S. 252 (1977). And if so, whether the scope of the remedy ordered was proportionate to the nature of the violation according to the principles enunciated in *Milliken v. Bradley*, 418 U.S. 717 (1974), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), *Hills v. Gautreaux*, 425 U.S. 284 (1976) and *Austin Independent School District v. United States*, 429 U.S. 990 (1976).

The Supreme Court noted that the district court had found that the school board had physically segregated students in the past, but those practices had since ceased. Faculty hiring had once been racially discriminatory, but the teaching staff was now substantially integrated. Though the district court found the schools racially imbalanced, there was no evidence of discrimination in the setting of attendance zones or in school site selection and construction. Similarly, the freedom of enrollment policy was found to be administered fairly and in a nondiscriminatory manner.

(In Dayton II, evidence contrary to the above was introduced, and evidence indicating a "purposeful discriminatory intent" warranted an inference and a finding that

segregation in other parts of the Dayton school system was also purposeful. This led to a systemwide remedy to eradicate the equal protection violations. Both of these cases dramatically show the importance of proper evidence of probative value being introduced at the trial level.)

The Supreme Court next addressed the district court's finding of a "cumulative violation" of the equal protection clause. The court questioned the first part of the cumulative violation because racial imbalance is not, by itself, a violation of the Fourteenth Amendment. The court relied on *Washington* in saying that only intentional segregative action by the board could make racial imbalance a constitutional violation. In addition, the court maintained that if the use of optional attendance zones was intended by the board to cause segregation, that action would be a violation only with respect to high school districting. As to the rescission problem, the court agreed with the Sixth Circuit's statements that the rescission of the previous board's resolutions was a constitutional violation only if the board was under a constitutional duty to take the action it initially took. "If the board was not under such a duty, then the rescission of the initial action (resolutions of the previous board) in and of itself cannot be a constitutional violation." *Dayton*, p. 414.

Thus, the scope of liability extended no further than the use of some optional zones. This then apparently had a present effect only as to certain high schools, and the rescission of the resolutions so far as they pertained to these high schools.

The court discussed the district court's first, original remedy at some length and implied that even that remedy may have been overly zealous. The Supreme Court concluded that the systemwide remedy finally conceived by the district court at the Sixth Circuit's urging was "entirely out of proportion to the constitutional violations found by the district court." *Dayton I*, p. 418.

The court based this conclusion on the fact there was no showing that the actions of the school board caused the system-wide segregation existing in Dayton, "a racially mixed community." Instead of imposing a systemwide remedy, the court said the Sixth Circuit should have tailored "a remedy commensurate to the three specific violations." *Dayton I*, p. 417.

The court instructed the district court that the present busing plan should remain in effect for the next school year subject to further orders from the district court. During that period the district court should take more evidence and follow *Washington* and *Arlington* in determining whether any school board action "was intended to, and did in fact, discriminate against minority pupils, teachers or staff." *Dayton I*, p. 420. Secondly, if such actions are found, the court said the lower court must determine how much effect they had on the racial distribution of Dayton students, compared with what the racial distribution would have been had such actions not occurred, and then fashion a remedy to redress only that difference.

Perhaps the most important aspect of the *Dayton* case for future school desegregation litigation is the emphasis placed on the intent standards derived from *Washington* and *Arlington* coupled with a strict, literal interpretation of the mandate from *Swann*, i.e., the nature of the violation determines the scope of the remedy. The court implies that the district court must examine objective, evidentiary sources to determine the specific effects of school board action, and only if there is a causal connection between action and existing discrimination or segregation can intent to discriminate be inferred. If such a causal connection is found, then, according to the court's interpretation of *Swann*, a remedy may be imposed to correct only that specific condition which was found to be caused by school board action.

Evans v. Buchanan

447 F. Supp. 982 (D. Del. 1978)

Prior to the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Delaware Supreme Court ordered the immediate admission of black children to certain schools previously attended only by white children in *Gebhart v. Belton*, 91 A. 2d. 137 (1952). The *Gebhart* decision was consolidated with *Brown I* and was subsequently affirmed by the Supreme Court, but the case was remanded, mandating "a prompt and reasonable start toward... a transition to a racially non-discriminatory school system."

In 1957, plaintiffs filed this action charging that the State Board of Education of Delaware had failed to follow the mandate of *Brown*. In *Evans v. Buchanan*, 152 F. Supp. 886 (D. Del. 1957), the district court found that no appreciable steps had been taken to effectuate compliance with *Brown I* and *II* and enjoined the individual school districts from refusing to enroll members of the plaintiff class. In addition, the court ordered the State Board to submit a plan of desegregation for the fall term of 1957.

A twelve-year, grade-by-grade desegregation plan was rejected, and the court ordered the board to develop a mod-

ified plan "for full integration of all grades of the public schools commencing with the fall term 1961." *Evans v. Ennis*, 281 F. 2d. 385 at 390 (3rd. Cir. 1960). The modified plan was adopted and approved by the court. The plan called for racially neutral geographic attendance zones, but despite this, the Wilmington Public Schools continued for years to remain racially identifiable. This clearly indicated that the segregated schooling in Wilmington had never been eliminated and that there still existed a dual system.

Accordingly, in 1974, a three-judge court held that the State Board of Education had failed to eliminate the "de jure" segregated schools and required the board to come forward with plans to remedy existing segregation. *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974). Following a hearing at which the state board and the affected county school districts were given the opportunity to present evidence, the same three-judge court filed a second opinion directing the submission of remedial schemes including inter-district desegregation proposals. *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975). The order was affirmed by

the U.S. Supreme Court. *Buchanan v. Evans*, 423 U.S. 963 (1975).

Following the U.S. Supreme Court's affirmance, the three-judge court attempted to redress the constitutional violation, but rejected nineteen proposals submitted by various groups. Based upon the principles enunciated in *Milliken v. Bradley*, 418 U.S. 717 (1974), the three-judge court stressed that the nature and scope of the constitutional violation required an inter-district remedy. The court then defined the geographic area of desegregation and noted that reorganization of the affected school districts would be required, but deferred to the state legislature to cure the violation both with respect to the scheme of reorganization and to issues of governance. In the event that the Delaware legislature defaulted, the three-judge court provided that the affected desegregation area should be one county-wide system governed by one county-wide board. To promote an orderly transition to a unitary system, the court allowed the parties a fifteen month delay. Finally, the three-judge court permitted whatever constitutional pupil assignment plan to become effective in two stages. *Evans v. Buchanan*, 416 F. Supp. 328 (1976). The order of the three-judge court was affirmed by the Third Circuit Court of Appeals. 555 F. 2d. 373 (3rd. Cir. 1977); cert. denied 434 U.S. 880 (1977).

The state of Delaware failed to act with regard to the 1976 order and declined to endorse and bring before the court any board or pupil assignment proposal. Instead, the state board, without benefit of implementing legislation, offered a voluntary scheme known as "reverse volunteerism". Such concept was rejected but a limited stay was granted. *Evans v. Buchanan* 435 F. Supp. 832 (D. Del. 1977). The court also ordered the state board to appoint a board to develop a complete desegregation scheme and to prepare and plan for the assumption of authority over the county school system. The new board was renamed the New Castle County Planning Board of Education (NCCPBE or "New Board"). *Id.*

The New Board filed a timely majority report (referred to as "10-2") addressing pupil assignment and other matters concerning desegregation and a minority report (Plan W). Hearings on the two plans commenced. Because the court perceived weaknesses in the two plans, the NCCPBE appointed a six-member pupil assignment committee. The committee formulated three viable alternatives to the NCCPBE's proposals. The opinion at 447 F. Supp. 982 (1978) discusses the five plans and other related matters.

Court Ruling: The court prefaces its discussion of the proposals by stating that "any pupil assignment concept intended to remedy the continuing inter-district violation must necessarily consider the composition and distribution of the student body throughout the desegregation area and the physical limitation of building capacity." 447 F. Supp. 982 at 994. Since the black school districts of Wilmington and Delaware contain far fewer students and building capacity than the nine predominantly white districts, the plaintiffs have accepted that black children will be reassigned to white schools a greater number of years than white children will be reassigned to black schools. Given this, each plan must be evaluated with an eye toward minimizing the proportionate impact upon the minority students whose constitutional rights have been violated.

Four of the five plans divided the desegregation area geographically into four attendance zones. Plan W employed nine clusters.

1. *The NCCPBE Majority Proposal—The 10-2 Concept*

This plan reassigns all students from the two predominantly black districts to the predominantly white districts for ten years and all students from the predominantly white district to the predominantly black districts for two consecutive years. As a consequence, all the black children in the two black districts from grades one through four and ten through twelve must attend schools in the white district. Also, none of the high schools in the black district would be used as a high school.

2. *The NCCPBE Minority Proposal—Plan W*

This proposal seeks to minimize the disproportionate impact upon black students during the transition from a dual system to a unitary one by maximizing utilization of Wilmington school facilities. Plan W seeks to increase the average time that black students spend in their home district. Through the use of nine clusters and randomizing assignment patterns of both white and black students, Plan W results in a significant number of white students never being assigned to a black district.

3. *The 9-3 "S" Configuration*

The Pupil Assignment Committee designed three "S" plans demonstrating that a 9-3 concept is feasible and employing existing elementary attendance zones in all districts as the basic desegregation tool. While developing the S concepts, the committee imposed upon itself certain perceived educationally sound assumptions and constraints (447 F. Supp. 482 at 996, footnote 80).

4. *The 9-3 Independent Feeder Configuration*

This proposal combines some of the so-called grids or geocodes of two predominantly white with grids of Wilmington. It feeds the children from the designated residential tracts into Wilmington High School for their high school years.

5. *The 9-3 "G" Concept*

This concept combines geocodes in Wilmington with elementary attendance areas in the predominantly white districts. It retains a tight feeder pattern and provides a full grade span in the predominantly black Wilmington district and, therefore, makes use of one of the Wilmington high schools.

The court then considered the proposals against the principles enunciated by the Supreme Court and the third circuit. The court recognized that the task of righting the discrimination necessarily entails "considering not only what is fair but also what is practical." 447 F. Supp. 982 to 999. Further, "... the court's duty is to implement a remedy, the parameters of which have been established by the three-judge court's primary remedial decree. To accomplish this end, a proper, though not sole, consideration is an awareness of the desirability of minimizing the disproportionate burden of any racial group in choosing a concept that effectively desegregates without the established pa-

rameters." 447 F. Supp. at 1001. The court rejected an argument made by the defendant state board and defendants from the nine predominantly white school districts that a voluntary transfer plan was sufficient to overcome the dual school system and the effects of de jure segregation. In addition, the state board's alternate proposal known as "reverse volunteerism"—providing for the mandatory assignment of black students to predominantly white districts but permitting any student to opt out—was also rejected.

The court found that the NCCPBE's 10-2 plan was undesirable because of a number of weaknesses. "Specific examples are reassigning only black children in the tender elementary years, . . . failing to use any of the black high schools as 10-12 grade centers. . . (and choosing) to maximize the disproportionate burden on black students by assigning them ten years. . . " without any supportable, non-racial explanation. 447 F. Supp. 982 at 1002-04. (The concept of 10-2 was generated by multiplying the 21.7% figure for black students in the affected area by twelve grades to determine that 2.6 was the number of grades requiring white reassignment in order to produce a complete mix.)

The court also found weaknesses and had "serious reservations regarding the feasibility of Plan W," the major weakness being that "only certain geographic areas actively participate and then for a varying number of years." Moreover, Plan W "fails to keep students together during the course of their educations to the same degree possible under the majority plan" (10-2). 447 F. Supp. 982 at 1004.

Finally, the court considered the Pupil Assignment Committee's report on the 9-3 concepts. The report indicated that total student involvement and retention of feeder patterns were possible. The "disproportionate impact on the aggrieved class" is minimized by the "use of three consecutive grade reassignments for students living in predominantly white districts and nine year reassignments for students in predominantly black districts." In addition, "a 9-3 concept provides ready opportunity to offer high school grades 10-12" in the black districts. 447 F. Supp. 982 at 1005.

The court decided that among the several 9-3 illustrations, the "G" configuration appeared superior. The "G" illustration retains a tight feeder pattern and provides full grade span in the Wilmington district and makes use of at least one of Wilmington's high schools. In addition, when Wilmington children are assigned back to the city for three years they necessarily attend a school close to their home. Further, the increased flexibility under "G" permits easy modification in the future. "Where the educational patterns of thousands of children are involved, a flexible approach is advantageous. 447 F. Supp. 982 at 1005.

The court concluded by stating that "given the clear superiority of the 9-3 concept and all indications that the alleged problem of capacity is capable of resolution, it is concluded that 9-3 is a concept that promises to meet the constitutional goal of effectuating a unitary non-discriminatory school system. . . ." 447 F. Supp. 982 at 1008. The court ordered the use of a 9-3 plan, but then only recommended the "G" illustration, leaving the question of which 9-3 proposal to use within the NCCPBE's discretion.

The court found "that an adequate remedy to the inter-district constitutional violation necessitates some manda-

tory transportation of students." Along with this, the court decided that the Equal Educational Opportunities and Transportation of Students Act of 1974 and the specific priorities enumerated in §1713 were inadequate to achieve substantial desegregation.

The court exempted "rising seniors" and kindergarten children from mandatory reassignment. Special schools serving handicapped or students otherwise eligible for special programs, and vocational technical schools were not included within the desegregation decree or were exempted. Those students who voluntarily transferred to school districts pursuant to Delaware law permitting voluntary transfer were not given an exemption and came under the desegregation plan.

Despite the objections of the State Board of Education, the court also determined that ancillary remedial relief is "necessary and essential to overcome the dual system and the vestige effects of de jure segregation and to assure an effective transition to a racially non-discriminatory unitary school system." 447 F. Supp. 982 at 1015. The power of the federal courts to provide ancillary relief were appropriate, concomitant to a desegregation decree upheld in *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*). The remedy must be related to the constitutionally offensive condition, designed "as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such condition" and fashioned in accordance with the legitimate interest of state and local authorities in self-management. *Milliken II*, 433 U.S. 267, at 273.

While the precise development and implementation of remedial relief was left to the discretion of the school authorities, the court delineated certain general guidelines for ancillary relief. The court ordered the NCCPBE to implement an in-service desegregation training program for teachers, administrators, and other staff. It directed the New Board to "institute an affirmative reading and communication skills program which does not resegregate pupils." 447 F. Supp. 982, at 1015-16. The court also ordered the school curriculum and programs to reflect the "cultural pluralism" of the students and to be free from racial bias. Non-discriminatory counseling and guidance programs must be provided. A faculty, administrative and staff school reassignment was ordered to eliminate "the dual school system and the vestige effects of de jure segregation (and) in order to insure that schools do not retain their former racial identity through racially identifiable faculty and staff assignments." 447 F. Supp. 982 at 1017.

In Delaware, public school education is financed through a combination of state and local supports. To supplement the state's contribution the local school districts individually imposed a tax upon assessed value of real property located within their respective boundaries. Severe disparities existed among the eleven districts regarding the tax rate, assessed value of properties and per pupil expenditures. Since the desegregation plan provides for one school district under the auspices of the NCCPBE, a uniform rate of tax was required. The court noted that "authorization to set a school tax rate is properly a product of the political process" . . . "(but) over two years had passed since the Supreme Court summarily affirmed the existence of a constitutional violation, and over seven months have elapsed

since the Third Circuit affirmed the propriety of an inter-district remedy." 447 F. Supp. 982 at 1025. The court "with deep seated reluctance" ordered that a tax rate be established and defined certain parameters in order to ensure that the Delaware legislature would not impede the transition to a unitary system through manipulation of the rate.

The eleven separate school districts in the county were consolidated into one school district for purposes of implementing the desegregation plan. The governing authority of those districts was vested in the NCCPBE. Be-

cause the transition to a racially non-discriminatory unitary system entailed increased costs, especially in the area of ancillary relief, the court required the new district to bear the costs of normal operating expenses. However, the court required the state to bear the bulk of the transitional desegregation costs for a limited period.

The court concluded by retaining supervisory jurisdiction over the case "until the transition to a unitary school system is demonstrably operational over time." 447 F. Supp. 982, at 1039.

United States v. Board of School Commissioners of City of Indianapolis, Indiana

The following chart traces the development of the Indianapolis case:

Date	Citation	Action
May 31, 1968		Suit initiated by U.S. Attorney General
Aug. 5, 1968		Finding of teacher segregation by district court
June 5, 1968	302 F. Supp. 309	District court dissolved temporary restraining order on teacher reassignment
Jan. 22, 1970	437 F.2d 1143	Court of Appeals affirmed district court order on teacher reassignment
Aug. 18, 1971	332 F. Supp. 655	District court finding of discrimination by IPS
Aug. 14, 1972	446 F.2d 573 Cert. den., 410 U.S. 909 January 22, 1973	Reconsideration of intervention by CIQS ordered by court of appeals
Feb. 1, 1973	474 F.2d 81 Cert. den., 413 U.S. 920 June 25, 1973	Court of appeals affirmed the district court's finding of discrimination by IPS
July 20, 1973	368 F. Supp. 1191	District court proposed remedy involving non-Marion County schools
Dec. 6, 1973		Supplementary opinion by district court
Aug. 24, 1974	503 F.2d 68 Cert. den., 421 U.S. 929 April 21, 1975	Court of appeals affirmed in part, reversed in part, the district court remedy
Aug. 1, 1975	419 F. Supp. 180	District court proposed new remedy
July 16, 1976	541 F.2d 1211	Court of appeals affirmed new proposed remedy
Jan. 1, 1977	429 U.S. 1068	Supreme Court vacated and remanded the proposed remedy
Feb. 14, 1978	573 F.2d 400 Cert. den., 99 S.Ct. 93 October 2, 1978	Court of appeals remanded case to district court with guidelines
July 11, 1978	456 F. Supp. 183	District court makes new findings and reinstates its Aug. 1, 1975 order

Background: This school desegregation case was filed on May 31, 1968 by the Attorney General on behalf of the United States pursuant to §407(a) and (b) of the Civil Rights Act of 1964. The original defendants were the Board of School Commissioners of Indianapolis, Indiana (hereinafter "Board" or "School Board"), the members of the Board and its appointed superintendent of schools. Plaintiffs sought to enjoin the defendants from operating the Indianapolis Public School System (hereinafter IPS) in an al-

legedly racially discriminatory manner. The two main areas of discrimination were teacher assignment and student assignment.

Phase I

In regard to teacher assignment the parties stipulated to all material facts alleged in the complaint. On August 5, 1968 the district court found that there was invidious racial discrimination in that the teachers were assigned to those

schools where the majority of the students were the same race as the teacher. This practice was found to violate the Fourteenth Amendment. The district court ordered reassignment of teachers and other appropriate relief.

Certain teachers sought to block this order and obtained a temporary restraining order in state court. The issue was removed to federal district court and the district court held that the removal was proper; the teacher reassignment order was proper; and the temporary restraining order should be dissolved. *Burns et al v. Board of School Commissioners of Indianapolis, Indiana* 302 F. Supp. 309 (S.D. Ind., June 5, 1969). The Court of Appeals affirmed this decision at 437 F.2d 1143 (7th Cir. Jan. 22, 1970). The Court of Appeals noted that if these teachers wanted to address this issue then they should have followed the proper procedure. (The teachers did seek to intervene in this action but intervention was denied. The district court and the court of appeals agreed that the proper procedure would have been to appeal the denial of intervention.) The teachers could not collaterally attack the decision in state court and were bound by the district court's decision.

Apparently no further action was taken by the teachers in this regard and presumably the teachers of IPS were desegregated.

Phase II

When the student portion of the case was pending, Citizens of Indianapolis for Quality Schools, Inc. (CIQS) moved to intervene as party defendants on behalf of the children of its 5000 members. The district court denied the motion on the grounds that the interests of CIQS were already adequately represented by the school board.

Following the decision of the district court on the student portion of the case (See Phase III below) CIQS appealed the denial of its motion to intervene. The court of appeals said that the denial was proper at the time it was made but in light of subsequent developments the district court should reconsider the motion. The subsequent developments were that the district court had enlarged the scope of the case to possibly include the areas surrounding the school city of Indianapolis Public Schools (i.e., IPS). In so doing, the district court requested that the intervention of several parties be sought. The court of appeals did not order that CIQS had to intervene; it merely directed the district court to reconsider the motion to intervene. See *CIQS v. United States* 466 F.2d 573 (7th Cir., August 14, 1972); cert denied 410 U.S. 909 (January 22, 1973).

Eventually CIQS was allowed to intervene and was a party to the action when the district court considered the appropriate remedy for this case.

Phase III

Trial on the student portion of the case was held on July 12-21, 1971. The district court's decision can be found at 332 F. Supp. 655 (S.D. Ind., August 18, 1971). The district court found two ultimate factual issues and two crucial dates. The district court summarized them as follows:

1. Did the School Board operate a dual school system, did it have a deliberate policy of segregating minority (Negro) students from majority (white) students in its schools on May 17, 1954 (the date of the *Brown I* decision)?

2. If the answer to the first question is in the affirmative, did the Board change its policy so as to eliminate such de jure segregation on or before May 31, 1968 (the date on which this suit was filed)? 332 F. Supp. at 658

The district court held that the burden of proof for both issues was on plaintiff and that plaintiff had satisfied that burden. Judgment was entered for plaintiff. The district court rejected the defendants' arguments that the conditions of segregation as of the date of trial should control. The district court noted that the Board had not desegregated even at the time of the trial.

The district court traced the history of race relations in Indiana from territorial days through the present. In several contexts, including housing and education, the district court found that there has been a discriminatory attitude toward blacks throughout Indiana history. This attitude has been manifested in private as well as public or state action. The district court realized that the desegregation of Indiana schools was supposedly ordered in 1949 by an act of the legislature. The court looked behind the purported end of segregation and found that in several ways, the state, acting through a school board or other agency, had successfully thwarted the desegregatory intent of the 1949 act. The success was so complete that in 1954 the Indianapolis schools remained at substantially the same level of segregation as they were in 1949 before the act was passed.

As to the time between *Brown I* and the filing of this law suit, the district court noted several instances of how the school board had continued to foster segregation in IPS. The district court cited the placement of new schools and the failure to adopt HEW guidelines for desegregation as examples of the Board's practices. The district court also pointed to other state action which fostered segregation. These actions included:

1. The placement of low-rent housing in a relatively small area, i.e., all such projects were within IPS boundaries;
2. Various agencies refused to approve school locations which would have alleviated some segregation;
3. The passing of the Uni-Gov Act and certain related legislation. (The common law of Indiana established that whenever an incorporated city or town expanded its corporate limits, the limits of the school city would also expand. In other words, the boundaries of the civil city and the school city would remain coterminous. The legislature altered the common law for the City of Indianapolis only, with certain legislation — Chapter 186 of the Acts of 1961 and Chapters 52 and 173 of the Acts of 1969. The result was that when the civil city of Indianapolis was expanded by the Uni-Gov Act, the school city was not expanded because the approval of the potentially affected school corporations was not forthcoming as was required by the new statutes.)

The district court found that there was de jure segregation at the time of *Brown I* and that it had not been eliminated "root and branch" by the time of this law suit. Therefore the district court could order a remedy which would eliminate or reduce the impact of that discrimination.

The district court said that it could order integration for the present school city and the case could end there. However, the district court believed that such a remedy would not satisfy the Supreme Court's directive in *Green* to formulate a remedy which "promises realistically to work now." The district court preferred to emphasize the word "work" rather than the word "now" and argued that an IPS-only remedy would not work. The district court argued that an IPS-only remedy would increase the percent of black students in most of the schools. This increase would put all the IPS schools too near the "tipping point" so that no lasting desegregation would be achieved; Therefore the remedy would not work. (The "tipping point" is that proportion of racial composition of a school where white flight becomes accelerated and irreversible. It is usually said to be about 40% black to 60% white student ratio.)

The district court was not sure what remedy would be proper. It realized that the joinder of several additional parties, including the various school districts within Marion County, would be helpful to the formulation of a remedy. In addition, the district court listed several questions which it thought should be answered in order to achieve a proper remedy. These questions were:

1. Are Chapter 186 of the Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969, or any of them, unconstitutional as tending to cause segregation or to inhibit desegregation of the Indianapolis School System?
2. If the answer to Question 1 is in the affirmative, did passage of the Uni-Gov Act automatically extend the boundaries of the School City coterminous with the boundaries of the Civil City, as provided generally by Indiana law?
3. If both of the foregoing questions are answered in the affirmative, are Lawrence, Beech Grove, and Speedway City presently under the jurisdiction of the defendant Board, or does Uni-Gov merely have the effect of annexing the eight township school corporations?
4. Regardless of the answer to the first three questions, should the General Assembly, by appropriate legislation, provide for the creation of a metropolitan school district embracing all of Marion County, together with all or some substantial part of the other counties going to comprise the Indianapolis Metropolitan Statistical Area, in order to purge the State of its role in contributing to de jure segregation in the Indianapolis School System?
5. If the answer to Question 4 is in the affirmative, and the General Assembly fails to act within a reasonable time, or in a reasonable way, does this Court have the power to create such a metropolitan school district by judicial decree?

Other questions likewise require an answer:

6. Does the Metropolitan Development Commission of Marion County have the power to deny the School Board its choice of sites for Crispus Attucks or other new schools? Put another way, does this Court have the power to override such Commission if it finds that its rulings interfere with desegregation?

7. Does this Court have the power to override rulings of the said Development Commission or of any other involved agencies with regard to the location of low-rent housing projects, if it finds that the locations of such projects interfere with desegregation, or tend to cause resegregation? 332 F. Supp. at 679

Finally, the district court ordered certain interim relief so that the arrival at the "tipping point" might be postponed until a more thorough remedy could be devised. That interim relief included ordering:

1. more equitable reassignment of teachers
2. continued desegregation of certain school(s)
3. amending a majority-to-minority transfer plan
4. investigating possible voluntary transfer plan to surrounding school districts
5. stopping of construction of a school which might further segregate

Phase IV

An appeal was made to the Supreme Court. Certiorari was denied in *Town of Speedway v. Dillin* 470 U.S. 920 June 19, 1972.

Phase V

The holding of the district court that there was de jure segregation in the IPS schools was appealed to the court of appeals in *United States v. Board of School Commissioners of Indianapolis, Indiana* 474 F.2d 81 (7th Cir., February 1, 1973). The court of appeals affirmed the district court's decision. The defendants raised two main issues on appeal, both of which were rejected by the court of appeals. The defendants argued:

1. That the district court erred in finding de jure segregation based merely on racial imbalance. The court of appeals said that racial imbalance is a proper factor to consider but it cannot be the sole basis for finding de jure segregation. The court of appeals pointed out other factors such as the long history of segregation and the gerrymandering of attendance zones which tend to show that the district court did not base its findings on mere racial imbalance. It is interesting to note that the court of appeals did not address the Uni-Gov issue. The court of appeals noted that the legislation made the school city of Indianapolis less than coterminous with the civil city but said "We draw no inferences from this fact" 474 F.2d at 82 (f.n. 2).
2. That the district court's finding of de jure segregation, based on all the evidence, was clearly erroneous. The court of appeals reviewed the findings of the district court in regard to:
 - a. gerrymandering of attendance zones;
 - b. stipulations as to segregation of teachers;
 - c. use of optional attendance zones;
 - d. choice of construction sites for new schools.

The court of appeals looked at the type of evidence and the quantity of the evidence and decided that the district court's inference of de jure segregation was not clearly erroneous. One example of the evidence which supported the district court was the

fact that since 1954, the school board has authorized approximately 350 attendance zone changes and over 90% of those changes promoted segregation.

The defendants also raised the argument that segregation would have occurred anyway due to change in residential patterns. The court of appeals rejected this argument by saying: "Schools influence residential patterns; the Board still segregated those schools on the borderline between residential areas; and the Board should not be able to promote segregation and then depend on a presumption of inevitability."

The court of appeals affirmed the decision of the district court. The defendants appealed this decision to the Supreme Court but certiorari was denied in *Board of School Commissioners of Indianapolis, Indiana v. United States* 413 U.S. 920 (June 25, 1973).

Phase VI

The next reported decision in this case is found at 368 F. Supp. 1191 (July 20, 1973). The district court noted that the earlier holding that IPS was guilty of unlawfully segregating the public schools within its borders was *res judicata*, i.e., it could not be challenged any further in this case. The district court also noted that several parties including some state officials, CIQS, and the parents of certain black students were allowed to intervene in this action in order to help formulate an appropriate remedy.

The district court recognized and resolved three main issues of fact in this case. They were:

1. Whether an IPS-only plan can be formulated so as to satisfy the Constitution and the *Green* decision, i.e., would such a plan "promise realistically to work..."? The district court decided that even though experts expressed opinions favoring both sides of this issue, the preponderance of the evidence demonstrated that an IPS-only plan would not be satisfactory.
2. Whether defendant officials of the State of Indiana have promoted segregation or failed to eliminate segregation as required? The district court traced the development of the public schools in Indiana and noted that the schools have been considered under state regulation and not local regulation. In other words, the state is responsible for the schools. The district court cited the case of *Bradley v. Milliken* 484 F.2d 215 (6th Cir., 1973) in support of the proposition that the actions of local officials can be the basis of placing the responsibility of *de jure* segregation on the state. Also, the school officials have done almost nothing to implement the mandate of *Brown*. These factors led the district court to hold that the state has not fulfilled its duty to desegregate and is therefore in violation of the Fourteenth Amendment.
3. Whether the defendant non-IPS school corporations have acted to promote segregation either within their respective borders or within IPS? The district court found that those defendants promoted segregation within IPS. The district court reasoned that the school corporations resisted a reorganization plan which would have alleviated segregation; the

school corporations had a legal right to resist but the evidence showed that the purpose for the resistance was the racially discriminatory purpose of keeping minorities out of the suburbs altogether; the causal connection between housing discrimination and school segregation was sufficiently demonstrated and should not be ignored.

After the findings of fact the district court concluded that:

1. The actions of the School Board and other officials can be imputed to the state.
2. Various state agencies practiced or promoted *de jure* segregation by acts of omission and/or commission.
3. The legislature has the power and the duty to correct this segregation.
4. If the legislature refuses to act within a reasonable time, then the district court would have to order whatever relief it deemed proper.

The district court then made some observations about what it would consider to be a proper remedy. Relying on the *Bradley* decision of the Sixth Circuit Court of Appeals (that decision was later reversed by the United States Supreme Court at 418 U.S. 717, 1974) the district court said that "the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts" and that the artificial barriers of boundary lines could be ignored, 368 F. Supp. at 1205. The district court also emphasized the argument that an IPS-only plan would create a "separate but equal" situation, a concept specifically rejected by *Brown*. In this regard the district court modified its outlook on the tipping point factor. Further evidence required the district court to reappraise the tipping point and it found that the tipping point was reached when 25%-30% of a school was black, not 40% as previously believed. Because the overall black student enrollment was over 40% for IPS, an IPS-only remedy would call for all IPS schools to become 40% black and this would virtually ensure that resegregation would occur.

The district court took judicial notice of the fact that there were no man-made physical impediments to an inter-district remedy and that commuting from the outlying areas to the center city area is common. Therefore, the district court concluded that inter-district relief would be feasible.

The district court briefly referred to the constitutional challenges to certain statutes but decided it need not address those issues.

Finally, in formulating an interim relief plan the district court first stated that it was without jurisdiction to order the busing of non-IPS students to IPS schools. The district court reasoned that it was the IPS students who sought relief; therefore the court could only order the busing of them. The district court then ordered certain relief including the busing of a certain number of black students from IPS to non-IPS schools. The district court also ordered all defendants to commence in-service training for their faculties and staff to orient their thinking in terms of desegregation.

The district court issued a supplemental opinion to this decision on December 6, 1973, 368 F. Supp. 1191. The district court placed a limit on the reasonable time within which the legislature had to act. The court said that the legislature would have to act and implement a remedy by

the 1974-75 school year or else the district court would formulate a remedy. The district court was not sure that the legislature understood that it had a duty to desegregate. The district court cited several Supreme Court cases in an effort to clarify what that duty was.

The district court also explained its one-way busing plan. Reasons for the plan included:

1. The IPS facilities were inadequate for its present student enrollment due to age, overcrowding, etc.
2. The Supreme Court has allowed one-way busing in some situations.
3. The costs of integration would be kept down.
4. Busing is not an unmitigated burden on those bused because there are advantages such as protection from the elements.

The district court vacated most of its decision which dealt with interim relief in order to give the legislature a chance to act. The district court continued the order directing in-service training for faculties and staffs and expressed the opinion that the court of appeals should not abandon this case. The district court saw important issues still needing to be resolved; those issues included:

1. Whether the State of Indiana had a duty to desegregate IPS and the extent of that duty.
2. Whether a metro plan or an IPS-only plan or some other plan would satisfy that duty.
3. Whether the district court had the power and/or duty to promulgate a plan if the State defaults on its duty.

Phase VII

The district court's decision was appealed and the Seventh Circuit Court of Appeals affirmed in part and reversed and remanded in part 503 F.2d 68 (August 21, 1974). The court of appeals decision summarized the prior actions and decisions of this case. The Court of Appeals affirmed the district court's orders which:

1. held that the School Board had defaulted in its duty to desegregate;
2. appointed a commission to develop a remedy;
3. implemented the commission's recommendations;
4. required the Board to apply for federal funds.

The court of appeals said that the Board had wasted enough time and, therefore, it was proper for the district court to order relief.

The court of appeals then addressed the issue of the scope of the remedy recommended by the district court. The district court's decision was rendered before the Supreme Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (July 25, 1974). The court of appeals had to follow the Supreme Court's decision and a modification of the district court's opinion was inevitable.

The court of appeals saw three possible remedies and a different decision resulted when each area distinction was considered. Those area-distinctions were:

1. A remedy encompassing IPS only. The court of appeals said that it was shown by the record that the state had promoted segregation within IPS by acts of

commission and omission and therefore such a remedy would be proper. The district court's holding was affirmed.

2. A remedy encompassing schools beyond the boundaries of Uni-Gov. Such a remedy was precluded by *Milliken*. The district court was reversed on this issue.
3. A remedy encompassing schools outside of IPS but within the Uni-Gov. boundaries. The court of appeals vacated and remanded the decision of the district court and ordered the district court to determine if inter-district relief was warranted because of Uni-Gov Act and the accompanying legislation. In a footnote the court of appeals quoted a portion of the *Milliken* decision which set forth the test the district court was to use. That footnote is reprinted here:

"Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." 418 U.S. at 745, 94 S.Ct. at 3127. Justice Stewart's concurring opinion: "Were it to be shown. . . that state officials had contributed to the separation of the races by drawing lines. . . ; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 503 F.2d at 86.

The court of appeals decided a number of other issues in this opinion including: The propriety of the addition of party defendants while appeal was pending, the award of attorney's fees, the need for a three-judge panel, and Eleventh Amendment issues. The court of appeals affirmed the decision of the district court on all these miscellaneous issues.

This decision was appealed by several defendants to the Supreme Court. Certiorari was denied at 421 U.S. 929 (April 21, 1975).

Phase VIII

The district court held another evidentiary hearing to resolve the issue presented by the court of appeals: to wit, whether the establishment of the Uni-Gov boundaries without a change in IPS boundaries warrants an inter-district remedy. The district court's decision is reported at 419 F. Supp. 180 (August 1, 1975).

The district court noted that the previous decisions of the district court and court of appeals established that IPS and various state officials "have, by various acts and omissions, promoted segregation and inhibited integration within IPS" 419 F. Supp. at 183. As a new finding, the district court found that the Housing Authority of the City of Indianapolis (HACI) had also promoted the segregation of IPS by the placement of housing projects exclusively within the boundaries of IPS. These and other facts led the district

court to conclude that a "limited inter-district remedy within all of Marion County" was warranted.

The court then examined certain state statutes (I.C. 1971 20-8.1-6.5-1 et. seq.) which purported to limit the use of inter-district transfer of students for desegregation purposes. The district court saw this as an implied recognition of the power of the courts to order such a transfer and did not see these statutes as serious limitations.

The court then considered the nature of the remedy to be ordered. It reiterated its previous findings that IPS had violated the Fourteenth Amendment and that a unitary system cannot be implemented within the IPS boundaries. In addition, the court of appeals ordered the district court to desegregate further the IPS schools. In trying to reconcile these findings and orders, the district court found itself "placed in an impossible position" unless the transfer of students from IPS to other school districts was allowed. The district court believed that it could not formulate a remedy that would "work," unless it could order the transfer of students from IPS to other districts. The district court's remedy was to order the transfer of a certain number of black students from IPS to non-IPS schools within Marion County. The number of students was approximately equal to 15% of the receiving school's enrollment. Washington and Pike Townships were excluded from this plan because these school districts reflected this student composition.

The district court referred to the court of appeals criticism of using "white flight" as a reason for not immediately dismantling the dual system of IPS. The district court defended its reliance on that factor by distinguishing between using "white flight" as an excuse for inaction and using it as a reason for a particular type of action. This latter use was deemed proper by the district court and that was the use in this case.

The district court enjoined the HACI from placing or reopening any additional public housing, except those for the elderly, within the boundaries of IPS because of the segregatory impact of such placement on the IPS schools.

Finally, the district court determined that plaintiff's counsel would be entitled to attorney's fees if the ruling of the district court in regard to transfer of students became final.

Phase IX

The district court's decision was appealed by defendants to the Seventh Circuit Court of Appeals 541 F.2d 1211 (July 16, 1976).

The court of appeals again reviewed the previous decisions in this case and also reviewed certain facts deemed pertinent to this appeal. Those facts included the history of public housing, the history of school district boundaries, and the passage of Uni-Gov. The court of appeals then turned to the issue of whether the establishment of Uni-Gov boundaries without a change in IPS boundaries warranted an inter-district remedy. The court of appeals concluded that such a remedy was warranted. The court quoted extensively from the Supreme Court's opinion in *Milliken* in several aspects including:

1. In *Milliken* the school district boundaries were coterminous with the city boundaries but that was

not the case in this situation after Uni-Gov was implemented.

2. In *Milliken* the discrimination within Detroit did not affect outlying school districts but this was not the case in Indianapolis.
3. In *Milliken* there was no showing of other racially discriminatory state actions which had been a substantial cause of inter-district segregation. Such a showing was made here in regard to the public housing issue.

These differences were sufficient to warrant an inter-district remedy.

In regard to the housing issue the court of appeals held that the relief ordered was "directed to correcting the effects of those past discriminatory acts" as described by the district court and therefore the relief was proper. Also, the court of appeals found that the district court had not abused its discretion in formulating this remedy.

Circuit Court of Appeals Judge Tone wrote a dissenting opinion. His main argument seemed to be that the finding of racial discrimination was based solely on findings of discriminatory impact and that no showing of discriminatory purpose was made. Judge Tone cites *Washington v. Davis* 426 U.S. 229 (1976) as requiring proof of discriminatory purpose before racial discrimination under the Fourteenth Amendment can be found.

Judge Tone also points out that *Milliken* requires that the scope of the remedy is limited by the nature and extent of the constitutional violation. For implementation of an inter-district remedy there must be an inter-district violation. Because there was no inter-district violation shown under the *Washington* standard (i.e., no discriminatory purpose was shown), no inter-district relief should be granted. Judge Tone would not have allowed inter-district relief and would not have allowed the injunction against HACI because of purposeful discrimination as to the passage of Uni-Gov, the placement of public housing, etc.

Phase X

The decision of the court of appeals was appealed to the Supreme Court. The Supreme Court vacated the decision of the court of appeals and remanded the case for further consideration. The decision is recorded at 429 U.S. 1068 (January 25, 1977) and is reprinted here in its entirety:

No. 76-212. METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA v. BUCKLEY ET AL.; and

No. 76-458. SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA, ET AL. v. BUCKLEY ET AL.; and

No. 76-468. METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA, ET AL. v. BUCKLEY ET AL. Appeals from C.A. 7th Cir.; and

No. 76-515. BOWEN, GOVERNOR OF INDIANA, ET AL. v. UNITED STATES ET AL.;

No. 76-522. HOUSING AUTHORITY OF INDIANAPOLIS v. BUCKLEY ET AL. C.A. 7th Cir. Certiorari granted in Nos. 76-515, 76-520, and 76-522. Judgment vacated and cases remanded for further consideration in light of *Village of Arlington Heights v.*

Metropolitan Housing Development Corp., ante. p. 252; and *Washington v. Davis* 426 U.S. 229 (1976). MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS dissent. Reported below: 541 F.2d 1211.

Phase XI

After the Supreme Court's decision, the court of appeals rendered another opinion at 573 F.2d 400 (7th Cir., Feb. 14, 1978). The court of appeals first listed the issues which had already been decided in this case and which were no longer open to challenge. These issues were:

1. The Indianapolis School Board was deliberately operating a de jure dual school system at the time of *Brown I* and had not changed its policies as of the start of this law suit so as to eliminate that segregation.
2. The State of Indiana had an affirmative duty to assist the School Board in desegregating because school officials are also state officials.
3. The District Court cannot order inter-district relief which includes school systems outside of the Uni-Gov area.

The major issue remaining to be resolved was whether the district court could order an inter-district remedy which affected only those school districts within the Uni-Gov boundaries. To resolve this issue the court of appeals held that the case must be remanded to the district court for further findings.

Apparently to assist the district court in its determination of this case, the court of appeals made the following analysis of this case:

1. Before any inter-district relief can be ordered, the *Milliken* standards must be satisfied. *Milliken* requires that the remedy must relate to the violation. In this case there are two actions which might possibly be sufficient violations so as to require inter-district relief. Those actions are:
 - a. Failure of the state to extend IPS boundaries when Uni-Gov was started. In order for this to be a basis of inter-district relief, the plaintiffs must show that intentional state action caused a significant segregative inter-district effect. (The court of appeals looked to the history of school boundary legislation and found sufficient intentional state action. There was also significant segregative inter-district effect because the legislation prevented the integration of IPS schools from extending to the white suburbs. This was particularly true because the legislation did not pass until after this law suit had already been started.)
 - b. Segregative housing practices of the State acting through various agencies including HACL. In order for this to be a basis of inter-district relief under *Milliken*, the plaintiffs must show:
 - i. discriminatory practices caused segregative housing patterns and population shifts, and
 - ii. the State had some direct or indirect role in those practices, and

iii. the State action need not be the sole cause of discriminatory practices but it must have a significant effect on those practices. (The Court of Appeals seemed to think that this test could be satisfied also.)

2. Even if plaintiffs can satisfy the *Milliken* standards, the *Washington* and *Arlington Heights* decisions require the plaintiffs to prove that the State action was motivated by racially discriminatory purpose(s). (The court of appeals did not believe that this issue was presented in the earlier stages of the litigation and therefore remanded this case for the district court to determine if such intent was present.)

The court of appeals went on to make some additional comments. It said that *Washington* does not prohibit the consideration of discriminatory impact in the determination of discriminatory intent and that *Arlington Heights* says that discriminatory intent need not be the sole basis for state action before there is a constitutional violation. Also the court of appeals pointed out that in *Arlington Heights* the Supreme Court listed several factors to consider in determining if there was discriminatory intent. The list was not a complete list but should be used as a starting point. The list is as follows:

1. the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;
2. the specific sequence of events leading up to the challenged decision;
3. departures from the normal procedural sequence;
4. substantive departures, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached; and
5. the legislative or administrative history of a decision. 429 U.S. at 267-68, 97 S.Ct. at 555. 573 F.2d at 413.

The court of appeals then commented on why a subjective standard of intent is not appropriate and formulated an objective test to be used. The court of appeals said:

It is clear, therefore, that discriminatory purpose for constitutional analysis is to be gleaned not from individual officials but from the relevant governmental institutions. As a subjective test would be impossible to apply in such circumstance, the courts are driven to adopt an objective criterion in determining whether the challenged state action is imbued with a segregative intent or purpose. Such a criterion must include an examination of the institutional policy that underlies the action.³² (By "policy" we mean a deliberate course of action, selected among alternatives, that is deemed advantageous or expedient.) We agree with the Sixth Circuit when it said:

A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

NAACP v. Lansing Board of Education. 559 F.2d 1042 1046 47 (6th Cir., 1977), quoting *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir., 1974).

Thus if plaintiffs establish either that the governmental action or inaction under scrutiny does not further the governmental policies or that the government ignored less segregative options which would have furthered its policies as effectively as the more segregative option it chose, see *Armstrong v. Brennan*, 539 F.2d 625, 636 (7th Cir., 1976), then a prima facie case of discriminatory intent or purposes has been made out. This inference is justifiable because governmental institutions must be presumed to have knowledge of the natural and foreseeable consequences of their action or inaction, and because there are rarely significant nonracial reasons for preferring a more rather than less segregative alternative. 573 F.2d at 414.

The court of appeals also discussed the injunction against HACL. The district court would have to re-examine that injunction but if either HACL had discriminatory intent in its site selection or the suburbs had discriminatory intent in denying public housing from their area, then the injunction would be appropriate.

Finally, the court of appeals ordered the district court to reconsider the inter-district remedy that it had ordered in light of the recent developments.

In a concurring opinion, Chief Judge Fairchild agreed that the district court must decide if there was discriminatory intent but does not agree with all of the court of appeal's analysis of the subjective test, standard of intent and other issues. Also, Chief Judge Fairchild does not agree that a finding of discriminatory intent on the part of the suburbs should support an injunction against HACL if HACL is free from discriminatory intent.

In a dissenting opinion, Judge Tone argues that the issues of discriminatory intent has been alleged, and argued that the district court has determined that there was no such intent. Therefore, says Judge Tone, the plaintiffs should not be given a second chance to prove that fact. Also, Judge Tone observes that a complete remedy for the intradistrict discrimination (i.e., the desegregation of IPS-only) has been delayed in the hopes of obtaining an inter-district remedy. The intradistrict remedy has been approved since 474 F.2d 81 (7th Cir., Feb. 1, 1973). It is time to end this case and order the approved remedy to be implemented.

Review by the U.S. Supreme Court was sought following this opinion but certiorari was denied.

Phase XII

Before the Supreme Court denied certiorari, the district court had rendered its most recent opinion in this case. That opinion was in response to the court of appeals remand and can be found at 456 F. Supp. 183 (July 11, 1978).

In regard to school segregation the district court reviewed the past decisions of this case and in view of all the foregoing facts stated, "It is perfectly obvious to this court, and it therefore finds, that the actions of the General Assembly above discussed were done, at least in part, with the racially

discriminatory intent and purpose of confining black students in the IPS system to the 1969 boundaries of that system." 456 F. Supp. at 188 (July 11, 1975).

As to the housing violations, the district court applied the presumption that was formulated by the Sixth Circuit Court of Appeals in *NAACP v. Lansing Board of Education* 559 F.2d 1042 (6th Cir., 1977) and quoted by the Seventh Circuit in its latest opinion in this case (See Phase XI). The district court applied the presumption to the facts of this case and held that the State had not rebutted that presumption; therefore the district court could order a remedy.

In its opinion of February 14, 1978 (573 F.2d 400) the court of appeals ordered the district court to make a determination of how much incremental segregative effect the constitutional violation (if shown) had on racial distribution of the student population. Such finding was required by the Supreme Court in *Dayton Board of Education v. Brinkman* 433 U.S. 406 (1977) in order to ascertain a remedy more closely related to the scope of the constitutional violation. The district court made such a finding but went on to say that Indiana statute allowed it to order the transfer of students without regard to the Dayton-type limitation and without regard to the culpability of the transferee school corporations. That statute is I.C. (1971) 20-8.1-6.5-1 et seq. and is summarized as follows:

The Act requires three findings to be made in order to justify the transfers:

- (1) A transferor corporation must have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the student within its borders;
- (2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and
- (3) The Fourteenth Amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). 456 F. Supp. at 191.

The district court specifically held that all the conditions of the statute were met and therefore it could order the transfer of students. In other words, the district court seemed to be saying that the authority to transfer students in this case is based on statutory not constitutional grounds; therefore the constitutional requirements of *Dayton* are not applicable.

The district court then ordered that its previous order of August 1, 1975 (see Phase VIII above) should be reinstated and revised so to apply to the 1978-79 school year. The district court also extended its limitations on construction or renovation of public housing projects to include any type of low-rent housing, other than for the elderly, as that term is defined in 42 U.S.C. Chapter 8 §§1401 et. seq.

Dayton Board of Education v. Brinkman (II)

U.S. (July 2, 1979)

39 CCH S.Ct. Bull., p. B4116

Background: After protracted litigation at both the trial and appellate levels, the district court held a supplemental evidentiary hearing per the remand order of the Supreme Court in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). The district court undertook to review the entire record anew and entered findings of fact and conclusions of law and a judgment dismissing the complaint. The district court ruled that although the Dayton Schools were highly segregated, the Dayton Board's failure to alleviate this condition was not actionable absent sufficient evidence that the racial separation had been caused by the board's own purposeful discriminatory conduct. In the district court's view, the plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, with respect to the board's challenged practices and policies. *Brinkman v. Gilligan*, 446 F. Supp. 1232 (SD. Ohio, 1977).

The court of appeals for the Sixth Circuit reversed, finding that in some instances the findings of the district court were clearly erroneous and that in other respects the district court had made errors of law. The Sixth Circuit held that at the time of *Brown v. Board of Education I*, 347 U.S. 483, in 1954, the Dayton Board had operated a racially segregated, dual school system. The board was constitutionally required to disestablish that system and its effects, but it had failed to discharge its constitutional duty. Finally, the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a systemwide remedy. *Brinkman v. Gilligan*, 583 F.2d. 243 (6th Cir., 1978).

The Supreme Court in a 5-4 decision, with Justice Rehnquist, who wrote for the majority in *Dayton I*, dissenting, affirmed the judgment of the court of appeals.

Court Ruling: The Supreme Court began by noting that at the time the complaint was filed in 1972, 43% of the students in the Dayton system were black, but 51 of the 69 schools in the system were virtually all-white or all-black. Enrollment data over the past 23 years revealed little or no change in the racial distribution of the Dayton school system. "Every school which was 90% or more black in the periods of 1951-52, 1963-64, or 1971-72 and which is still in use today remains 90% or more black. Of the 25 white schools in 1972-73, all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52." *Brinkman v. Gilligan*, 583 F.2d. 243, at 254 (6th Cir., 1978), quoting *Brinkman v. Gilligan*, 503 F.2d. 684, at 694-695 (6th Cir., 1974).

Regarding the findings of the district court, the Supreme Court stated that: "In support of its judgment, the district court observed that although various instances of purposeful segregation in the past evidenced 'an inexcusable history of mistreatment of black students', 446 F. Supp. at 1237, plaintiffs had failed to prove that acts of intentional segregation over 20 years old had any current incremental segregative effects. . . In the district court's eyes, plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, with respect to the challenged practices and policies of the board, which included faculty

hiring and assignments, the use of optional attendance zones and transfer policies, the location and construction of new and expanded school facilities, and the rescission of certain prior resolutions recognizing the board's responsibility to eradicate racial separation in the public schools." 39 CCH S.Ct. Bull. p. B4119-20.

The Supreme Court also discussed at length the decision of the court of appeals which expressly held that the Dayton Board was operating a dual school system at the time of *Brown I* in violation of the Fourteenth Amendment. The court of appeals found that in the early 1950's, 77.6% of all students attended schools in which one race accounted for 90% or more of the students, and that 54.3% of the black students were assigned to four schools that were 100% black. In addition, black schools were intentionally created and maintained in the 1930's and 1940's and at the time of *Brown I*. Moreover, in 1950, it was found that the faculty at 100% of the black schools was 100% black and the faculty at all the other schools was 100% white.

The facts made it clear, according to the court of appeals, that that board was purposefully operating segregated schools in a substantial part of the district, which warranted an inference and a finding that segregation in other parts of the system was also purposeful. (See *Keyes v. School District No. 1*, 413 U.S. 189 (1973), which authorizes the use of such a presumption or inference, as well as others.) According to the court of appeals and Supreme Court, the district court had ignored the legal significance of the intentional maintenance of black schools at the time of *Brown I*, as well as the significance of purposeful segregation in faculty assignments as was discussed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The court of appeals concluded that the board had not responded with sufficient evidence to counter the inference that a dual system was in existence in Dayton in 1954, and, therefore, the board's "intentional segregative practices can not be confined in one distinct area"; they "infected the entire Dayton system." 583 F.2d. 243, at 252.

Given the segregated school system in 1954, as found as fact by the court of appeals and Supreme Court, the board was "thereafter under a continuing duty to eradicate the effects of that system. . ." 39 CCH S.Ct. Bull. p. B4124, citing *Columbus Board of Education v. Penick* decided the same day with and a companion of *Dayton II*. Part of the affirmative duty of the board was the obligation not to take any action that would impede the process of eradicating the dual system and its effects. It was found that the actions of the Dayton Board had increased and perpetuated segregation after *Brown*. Discussing further the duty of the Dayton Board where it is found that their system is permeated with de facto segregation, the Supreme Court stated that the "measure of the post-Brown conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. . . As was clearly established in *Keyes* and *Swann*, the board had to do more than abandon its prior discriminatory purpose." 39 CCH. S.Ct. Bull. p. B4125-26.

According to the Supreme Court, the board had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices were not used and did not serve to perpetuate or re-establish the dual system. The board had failed its duty with regard to these responsibilities and others, and had attempted to perpetuate racial separation in the schools. Regarding the defendant board's burden of proof, the Supreme Court stated that the board has a "heavy burden" of showing that policies and actions that increase or continue the effects of the dual system serve "important and legitimate ends."

Finally, the Supreme Court approved the court of appeals finding, after the remand of the case in *Dayton I*, that a sufficient case of current, systemwide effect had been established. This was not a misuse of *Keyes*, where it was held that "purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted" and that "given the purpose to operate a dual system one could infer a connection between such a purpose and racial separation in other parts of the school system." The court of appeals was also justified in utilizing the *Dayton Board's* failure to fulfill its affirmative duty and its conduct perpetuating or increasing segregation to trace the current systemwide segregation back to the purposefully dual system of the 1950's and the subsequent acts of intentional discrimination.

Dayton II and *Columbus Board of Education v. Penick* are important cases for future desegregation litigation. As Jus-

tice Rehnquist states in his dissent in *Dayton II*, the presumptions of *Keyes* and *Swann*, as interpreted in *Dayton II* and *Columbus* "sweep(s) away the distinction between de facto and de jure segregation." Moreover, the court's use of affirmative duty "renders any discussion of segregative intent after 1954 gratuitous. . . ." Given a de facto segregated school system in 1954, the school board overseeing that system has an affirmative duty to desegregate, including refraining from actions or policies that impede desegregation or perpetuate segregation. If a de facto segregated school system is, in fact, proved to have existed in 1954, or if a de facto system has come into existence after 1954, the board has a duty to desegregate. If little or nothing is done regarding the dual system, the board has not fulfilled its duty and is in violation of the Fourteenth Amendment's equal protection clause. Moreover, this is without respect to purpose or discriminatory purpose since the court stated in *Dayton II* that it is the "effectiveness" in liquidating the dual system not the purpose behind the board's actions even though they are nondiscriminatory. However, the board can rebut this by showing that their actions or inactions served "important and legitimate ends"—a difficult task.

Dayton II and *Columbus* need to be read in conjunction since both deal with different issues that led to substantially the same result with the same rationale. Only further interpretation will firm up the decisions rendered in these two cases and make clear the court's ostensibly new approach to de facto and de jure segregation.

Columbus Board of Education v. Penick

429 F. Supp. 229

583 F.2d 787

This case was originally filed on June 21, 1973 in Federal District Court for the Southern District of Ohio. After trial and judgment in Federal District Court, the case was appealed to the Federal Court of Appeals, Sixth Circuit. Soon after the Federal Court of Appeals affirmed the District Court judgment, the Supreme Court of the United States agreed to review the findings of the lower courts. The below analysis summarizes the Supreme Court's opinion.

Parties: On June 21, 1973 fourteen students in the Columbus school system (plaintiffs) brought this case in Federal District Court against the Columbus Board of Education and the State Board of Education (defendants). The plaintiffs were ultimately certified to represent all similarly situated students in Columbus in a class action. The actual complaint charged that the defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating segregation in Columbus public schools, contrary to the Fourteenth Amendment of the U.S. Constitution. The trial in Federal District Court began in October, 1975 and lasted 36 days.

Facts: The evidence adduced at trial showed that the public schools of Columbus Ohio were highly segregated by race.

In 1976, over 30% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. Half of the 172 schools were 90% black or 90% white.

Final arguments at trial in Federal District Court were heard in September, 1976, and the District Court rendered its findings in the case March, 1977.

From the evidence adduced at trial, the District Court found that the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown v. Board of Education (I)*, 347 U.S. 483 was decided in 1954. The Court found that since the decision in *Brown v. Board of Education*, 349 U.S. 294 (*Brown II*), the Board had been under a continuous constitutional obligation to disestablish its dual system and that the Columbus Board of Education never actively set out to dismantle this dual system. The Court found that until legal action was initiated, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition or the student enrollment at those schools. The Columbus Board even in very recent times has approved optional attendance zones, discontinuous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus

Public Schools. The Board, even in very recent times and after promising to do otherwise, has rejected workable suggestions for improving the racial balance of city schools.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and other such actions and decisions of the Columbus Board of Education in recent and remote history, the Court found it fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions.

The District Court's ultimate conclusion was that at the time of trial the racial segregation in the Columbus school system directly resulted from the Board's intentional segregative acts and omissions, in violation of the Equal Protection Clause of the Fourteenth Amendment.

The District Court, accordingly, enjoined the defendants from continuing to discriminate on the basis of race in operating the Columbus public schools, and ordered the submission of a systemwide desegregation plan.

Before submission of the systemwide desegregation plan, the Columbus School Board sought modification of the District Court's order for a systemwide plan. However, the District Court rejected the argument that *Dayton Board of Education v. Brinkman* (I), 433 U.S. 406 (1977), a subsequent Supreme Court case, permitted any such modification. Although *Dayton I* indicated that the scope of the constitutional violation measures the scope of the remedy, the District Court reiterated its conclusion that the School Board's liability in this case concerns the Columbus School District as a whole. Consequently, the School Board thereafter submitted a systemwide desegregation plan. The plan was stayed pending appeal to the Federal Court of Appeals.

Based upon its own examination of the extensive District Court trial record, the Federal Court of Appeals affirmed the judgment entered against the Columbus School Board.

The U.S. Supreme Court subsequently granted the Columbus School Board's request for appeal. The implementation of the desegregation plan was stayed pending disposition of the case by the U.S. Supreme Court.

Issue: The sole issue on this appeal to the U.S. Supreme Court was whether the judgment of the District Court, which was affirmed by the Appeals Court, was correct.

Discussion: The School Board contends on this appeal, that when the case was originally filed and tried, its operation of a segregated school system was not done with any discriminatory purpose, and that any unconstitutional conduct it may have been guilty of in the past at no time had systemwide segregative impact, and surely no remaining systemwide impact at the time of the trial. Therefore, the systemwide remedy was contrary to the rule espoused in *Dayton I* that the scope of the constitutional violation measures the scope of the remedy.

The Supreme Court discovered no reason on its review of the trial record to disturb the judgment of the trial court that the school board's conduct at the time of trial, and before, not only was animated by an unconstitutional, segregative purpose, but also had current segregative impact that was sufficiently systemwide to warrant the remedy ordered by the District Court.

The Supreme Court held that the District Court's conclusions were correctly founded on the following constitutional violations by the Columbus School Board:

1. In 1954, when *Brown I* was decided, the Columbus School Board was not operating a racially neutral, unitary school system, and the then existing racial separation was the direct result of cognitive acts or omissions of the School Board who had originally intentionally caused and later perpetuated the racial isolation. Such separateness could not have been the result of racially neutral official acts.
2. Although segregated schooling was not commanded by state law, the Columbus Public Schools were nevertheless officially segregated by race in 1954. Whoever by virtue of a public position under a state government denies or takes away the equal protection of the laws, violates the Constitution.
3. Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the School Board, which was not forthcoming in this case. *Keyes v. School District No. 1*, 413 U.S. 189 (1973).
4. Since the decision in *Brown v. Board of Education II*, 349 U.S. 294 (1955), the Columbus School Board had been under a continuous constitutional obligation to disestablish its dual school system, and it had failed to discharge this duty. Each instance of a failure or refusal to fulfill this affirmative duty continued the violation of the Fourteenth Amendment.
5. School boards operating dual school systems (such as Columbus School Board) are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. *Green v. County School Board*, 391 U.S. 430 (1968).
6. When school authorities fail in their affirmative obligations to dismantle dual school systems, judicial authority may be invoked. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
7. Where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown. *Swann*, at 18.
8. The school board's continuing affirmative duty to disestablish the dual school system, mandated by *Brown II*, is beyond question, and there is nothing in the record to show that at the time of trial the dual school system in Columbus and its effects had been disestablished.
9. Since the 1954 *Brown* decision, the Columbus School Board was adequately put on notice of the fact that action was required to correct and to prevent the increase in segregation, and yet the school board not only failed to heed its duty to alleviate racial segregation in schools, but in fact took actions which intentionally aggravated, rather than alleviated racial separation in the schools.

Further, the Supreme Court held that the district court's decision was correctly decided on the basis of the following rules of law:

1. A plaintiff, seeking to make out an equal protection violation on the basis of racial discrimination, must show intent to discriminate;
2. Although disparate impact and foreseeable consequences, without more, do not establish a constitutional violation, actions having foreseeable and anticipated disparate impact are evidence that tend to prove such a constitutional violation.
3. Since the district court found purposeful segregative practices with current, systemwide impact, the systemwide remedy imposed was consistent with the *Dayton I* rule requiring that the remedy imposed by a court be commensurate with the violation ascertained.
4. Purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of systemwide discriminatory intent unless otherwise rebutted, and given the purpose to operate a dual school system, one could infer a connection between such a purpose and racial separation in other parts of the school system. *Keyes I*.

Because the District Court and the Court of Appeals committed no prejudicial errors of fact or law, the judgment was affirmed by the Supreme Court.

Dissent: (Note: The dissent represents the opinion of only a minority of the Supreme Court, and is therefore not controlling law.) Justices Rehnquist and Powell disagree with the majority opinion, Justice Rehnquist writing the basis of their dissent:

The traditional importance in the U.S. of local autonomy in the operation of public schools, demands that the federal courts limit their intrusion to "carefully and clearly defined" constitutional violations and their remedy to only that "necessary to correct the identified violations." (Rehnquist dissent, slip opinion at 2)

Here the evidence fails to support the district court's intrusion into the operation of the Columbus Public School System. The U.S. Supreme Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), set out the determinants for finding a school policy racially discriminatory when, as here, the policy is not mandated by state law,—proof of discriminatory purpose, and proof of a causal connection between actions motivated by that purpose and a current condition of segregation in the school system. The evidence presented to the district court fails to support the district court's finding that the factors set forth in *Keyes* have been proven.

Prior to *Keyes*, the U.S. Supreme Court addressed only instances of segregation mandated by state law. Under *Brown I* and *II*, these statutes were abolished and the school boards were imposed with an affirmative duty to eliminate segregation. This duty was interpreted by *Green v. County School Board*, 391 U.S. 430 (1968) to require that boards do more than simply permit black students to attend white schools (action v. inaction). *Brown II* imposed an affirmative duty however, only when a "dual system" was found to exist. When plaintiff claims racial discrimination in a

school system when the segregation is not mandated by state law, *Keyes* allows the finding of a "dual system" upon proof of a systematic program of segregation affecting a substantial portion of the school system. *Keyes* further notes that once such a showing is made and a dual system found to exist, *Brown II* imposes an affirmative duty upon the school board to effect a transition to a nondiscriminatory school system. Here however, the District Court held the Columbus School Board to the affirmative duty standard of *Brown II*, not to establish a duty to remedy a dual system, but to establish the existence of a dual system in the first instance.

The District Court further erred by using evidence of pre-1954 acts of racial discrimination as they related to segregated conditions in 1954. No causal connection was shown between pre-1954 violations and current segregated conditions. Here the court merely assumed past violations affected present segregated conditions.

Rehnquist further attacks evidence of post-1954 actions of the School Board found to support intentional segregation. He asserts the instances were isolated and provided no proof of the systemwide segregation required under *Keyes*. Moreover, in examining post-1954 instances, the District Court found intent to discriminate solely on evidence showing that natural and foreseeable results of the board's action or inaction would be segregative, or the perpetuation of segregation. Because the most prevalent student-assignment policy in urban areas is the neighborhood policy, and because almost every urban area has racial and ethnic neighborhoods over which the school board has no control, any school board using a neighborhood policy perpetuates segregation by its inaction. This amounts to imposing a duty on the school board to compensate for discriminatory conduct not caused by them. Though the natural and foreseeable effects of the challenged discriminatory actions are proper considerations in proving a discriminatory purpose, when these effects are the sole type of proof of purpose, then discriminatory purpose is established by evidence of mere discriminatory impact—an approach rejected in Fourteenth Amendment cases. *Washington v. Davis*, 426 U.S. 229 (1976).

Justice Powell adds:

He accepts Rehnquist's analysis, especially his attack upon a series of presumptions not supported by evidence. In addition, he attacks a systemwide remedy when the absence of integration cannot be reasonably attributed to any discriminatory conduct of the school board. He admonishes that the remedy must not exceed the scope of the constitutional violation. Extensive reorganization, such as ordered here, adversely affects the quality of education. Further:

Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education. . . . The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.

(Powell's dissent, at 9, 11).

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